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Supreme Court of the United States

OCTOBER TERM, 1945

No. 6.

AMERICAN POWER & LIGHT COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

BRIEF FOR PETITIONER.

Preliminary Statement.

This cause is before this Court on writ of certiorari to review a decree of the United States Circuit Court of Appeals for the First Circuit, entered on March 17, 1944.*

This decree affirmed an order of the Securities and Exchange Commission (herein called the "S. E. C."), entered in a proceeding initiated by the S. E. C. under Section 11(b)(2) of the Public Utility Holding Company Act of 1935 (herein called the "Act") which order directed dissolution of the petitioner, American Power & Light Company (herein called "American").

* Record consolidated with record in case No. 7 (October Term, 1945), *Electric Power & Light Corporation* v. *Securities and Exchange Commission.*

The so-called death sentence provision of the statute here attacked, i.e., Section 11(b)(2) of the Act, and the procedure under that provision, present questions that are novel before this Court.*

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the First Circuit (R., Vol. IV, 869-899) was rendered on March 17, 1944, and is reported in 141 F. 2d 606. On April 18, 1944, that Court entered an order denying American's application for rehearing (R., Vol. IV, 901).

The opinion of the S. E. C., rendered August 22, 1942 (R., Vol. II, 523-649), is reported in 11 S. E. C. 1146. On August 28, 1942, the S. E. C. denied American's application for rehearing (R., Vol. II, 677-678).

Jurisdiction.

Jurisdiction to review the order of the S. E. C. was specifically conferred on the Circuit Court of Appeals for the First Circuit (American being a corporation of the State of Maine within said Circuit) by Section 24(a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. §79x(a)), which likewise confers upon this Court jurisdiction to review upon certiorari the judgments and decrees of the Circuit Court of Appeals, as provided in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347).

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* Counsel for American, as *amici curiae*, have filed a brief in the *North American* case, involving Section 11(b)(1), which is being simultaneously presented to this Court. Such brief was filed March 30, 1943, before it was known that the cases would be presented together and contains in condensed form some of the arguments made herein.

Petition for writ of certiorari was filed in this Court on June 16, 1944, and was granted by order entered May 28, 1945.

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803; 15 U. S. C. §79).* The order of the S. E. C. was made under Section 11(b)(2) of the Act (49 Stat. 820-821; 15 U. S. C. §79k(b)(2)). The portion of Section 11(b)(2) directly involved reads as follows:

> "(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> * * * * * *
>
> (2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. * * *"

Issues Presented.

Broadly speaking, and without limiting the detailed statement hereinafter made in the "Specification of Errors", the issues presented fall into two categories, viz:

1. *Section 11(b)(2) is unconstitutional,* because it takes property of American and its security holders without payment of just compensation, it is not an exercise of any

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* Printed pamphlets containing copies of the Act in full will be submitted with this brief.

Federal power, and it is a delegation of legislative power without any standards for guidance.

2. *The proceedings before the S. E. C. and the dissolution order are invalid,* because they violate the due process clause in that the S. E. C. itself has not developed any standards for action under Section 11(b)(2), the S. E. C. denied American a hearing on certain of the issues necessarily involved, and dissolution of American is an unreasonable and oppressive means of remedying alleged defects in the Bond and Share System; because the dissolution order is not supported by substantial evidence; and because dissolution of a corporation is not authorized by the terms of Section 11(b)(2).

Description of American.

American is a "registered holding company" and is itself the parent of a "holding-company system" under the terms of the Act by reason of holding substantially all of the common stock of 16 subsidiary operating utility companies (R., Vol. I, 33; Vol. II, 539, 541). Because of the ownership of a small portion of the securities (more than 10 percent of the voting shares) of the petitioner by Electric Bond and Share Company (herein called "Bond and Share") the petitioner is by statutory definition (Section 2(a) 7-9) a subsidiary of Bond and Share, and as such is a member of the Bond and Share holding company system.

It should be borne in mind that the single ultimate issue framed by the S. E. C.* for its own determination in this proceeding was whether the existence of *American Power & Light Company* should be terminated in order to ensure,

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* Orders of May 9, 1940 (R., Vol. I, 27-54) and June 7, 1940 (R., Vol. I, 65-66).

in the language of Section 11(b)(2) of the Act, that the structure of the holding company system of *Bond and Share* should not be unduly or unnecessarily complicated, or voting power unfairly or inequitably distributed among security holders of *that System.*

The following description is summarized principally from the S. E. C.'s Findings and Opinion:

American was organized in 1909 in Maine and immediately following its organization acquired certain local utility companies in Kansas and Oregon. From the time of this initial acquisition to December 31, 1941, American and subsidiaries have acquired 427 companies or properties which have been combined and simplified into 16 direct utility and 6 direct non-utility subsidiaries* (R., Vol. II, 406, 411, 451-452, 539).

As of December 31, 1941, the public utility subsidiaries of American served with electricity approximately 148 communities of a population of 2,500 or over, and served with gas some 26 such communities, the total population of the communities so served being approximately 2,740,000. These communities are located in 14 states with the principal operations being in the Pacific Northwest, including Montana, and in Arizona, Texas, Kansas-Nebraska, Minnesota-Wisconsin, and Florida (R., Vol. II, 541-542).

Through the issuance of securities for properties and through sale of securities to the public for cash, the capi-

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* These utility subsidiaries as of that date were: Central Arizona Light & Power Company, Florida Power & Light Company, Kansas Gas and Electric Company, Minnesota Power & Light Company, The Montana Power Company, Nebraska Power Company, New Mexico Electric Service Company, Northern Power Company, Northwestern Electric Company, Pacific Power & Light Company, Portland Gas & Coke Company, Superior Water, Light and Power Company, Texas Electric Service Company, Texas Power & Light Company, Texas Public Utilities Corporation and The Washington Water Power Company.

talization of American grew from the initial $8,000,000 in 1909 to $263,101,529 twenty years later, and consolidated assets of American and its subsidiaries expanded from approximately $9,800,000 to $754,129,787 (R., Vol. II, 560-561).

At December 31, 1941, these consolidated assets were carried at $851,251,525 (R., Vol. II, 540) and the consolidated capitalization of American and such subsidiaries as of the same date was as follows (R., Vol. II, 539-540):

Long-Term Debt:	
American	$ 45,849,000
Subsidiaries	311,437,072
Preferred Stocks:	
American	177,145,326
Subsidiaries	111,622,100*
Minority interest	621,193
Undeclared Cumulative Dividends on Preferred Stock of Subsidiaries held by Public	3,615,226
Common Stock: American	37,434,351
Capital Surplus	36,026
Earned Surplus	45,968,643
	$733,728,937

* Erroneously printed in Record as $11,622,100.

American owns high percentages of the voting stocks of its utility subsidiaries, in most cases 90% or upwards (R., Vol. II, 541). The aggregate par, stated or assigned value of all securities of its subsidiaries owned by American as of December 31, 1941 was $260,227,223, and their book value on the books of the issuers, including surplus and preferred dividend arrearages, was $304,787,950. American carried these securities in its investment account at $251,537,054 (R., Vol. II, 540).

The subsidiaries of American have outstanding in the hands of the public $311,437,072 of bonds and $110,032,100

of preferred stocks (excluding reacquired preferred stocks) (R., Vol. II, 539-540; pp. 1, 3, of Exhibit D to 1941 form U5S of American*; R., Vol. I, 262).

The capitalization of American itself as of December 31, 1941 was as follows:

Debenture Bonds (issued and assumed)	$ 45,849,000.00
Preferred Stock (stated value)	177,145,326.00
Common Stock (stated value)	37,434,351.29
Surplus	10,064,934.07
Total capital and surplus	$270,493,611.36
Unpaid cumulative dividends in arrears	$ 35,114,788.00

(R., Vol. II, 537.)

American is eminently solvent, and is the investment medium of 45,000 public investors,—stockholders and bondholders (R., Vol. II, 537; Tr. 1968). Of its $225,000,000 book value of outstanding stocks, over $215,000,000, or more than 95½%, and all its Debentures ($45,849,000 at December 31, 1941) are owned by the general public. *Less than $10,000,000, or less than 4½% in book value, of its stocks are owned by one corporation, Bond and Share.*** It is this 4½% holding only (representing more than 10% of voting power) which makes American and its subsidiaries part of the Bond and Share System by statutory definition.***

Prior Proceedings Herein.

The proceedings resulting in the orders here brought under review were instituted by the S. E. C. on May 9, 1940, by a "Notice of and Order for Hearing Pursuant to Sec-

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* References to material other than the printed record are to exhibits and testimony on file in this Court which, pursuant to stipulation of the parties, are part of the record before this Court.

** Figures taken from Findings and Opinion of the S. E. C. (R., Vol. II, 537-538). Bond and Share itself is owned by over 100,000 holders of preferred and common stock, no one of whom owns as much as 1% of the stock of Bond and Share (Exhibit F(d), p. 9, to Form U5S of Bond and Share for period ended December 31, 1939).

*** Bond and Share has 20.7% of the voting shares.

tion 11(b)(2) of the Public Utility Holding Company Act of 1935" (R., Vol. I, 27-54). Under S. E. C. practice this document serves the combined functions of complaint and process.

This notice and order was entitled "In the Matter of Electric Bond and Share Company, American Power & Light Company", and other subsidiary holding companies of the Bond and Share System. That System was described as including the following subholding companies: American Power & Light Company, Pacific Power & Light Company (a subsidiary of American), Electric Power & Light Corporation, Utah Power & Light Company (a subsidiary of Electric Power & Light Corporation), National Power & Light Company, American & Foreign Power Company Inc., and also American Gas and Electric Company (R., Vol. I, 29), and the operating subsidiaries of each of these companies (R., Vol. I, 34-47).*

The ultimate concrete allegations upon which the charges of "undue and unnecessary complication of structure" and "unfair and inequitable distribution of voting power" (R., Vol. I, 49) were apparently predicated, included statements of the capital structure of system companies, and of the disparity between the values of the voting securities of American held by Bond and Share and the total values of the consolidated assets of American, and between the

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* American Gas and Electric Company was not made a party to the proceedings for reasons stated in the notice and order (R., Vol. I, 47). By order dated June 7, 1940, the Commission directed that the hearing should be limited initially to issues concerning American, Electric Power & Light Corporation, National Power & Light Company and American & Foreign Power Company, Inc. (R., Vol. I, 65-66). By order dated June 17, 1940, American & Foreign Power Company, Inc., was dismissed as a party to the proceeding (R., Vol. I, 79). On August 27, 1941, at the conclusion of the hearings involving National Power & Light Company, that company was ordered dissolved and accepted the order. Thus the proceedings in their present form involve only American and Electric Power & Light Corporation.

stated values of the voting securities in its subsidiaries held by American and the consolidated capitalization of American and its subsidiaries.

A hearing was ordered to determine whether these allegations were true, and generally what action was necessary to be taken by respondents to ensure that their corporate structure or continued existence did not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of the *Bond and Share System* (R., Vol. I, 50). A further order of June 7, 1940, entered before the hearings began, limited the issue to "whether it is necessary to disdiscontinue the existence" of American in order to ensure these results (R., Vol. I, 65-66). *We emphasize that it is solely the effect of or position of American in the Bond and Share System, and not its position or effect within its own system, that was presented by the S. E. C. for its own determination.*

The form of this June 7, 1940 order further poses one of the fundamental questions in this case. It does not quote or correctly paraphrase the language of Section 11(b)(2) of the Act (see page 3, *supra*) which authorizes the S. E. C. to determine whether the "corporate structure or continued existence of any company in the holding company system" unduly or unnecessarily complicates structure or unfairly or inequitably distributes voting power. It is *corporate structure or continued existence in the system* and not the *corporate existence* of the company which the Act provides may be dealt with by the S. E. C. There is no express provision for dissolving any company contained in the Section. The order here under review is directed solely to the corporate existence of American and not to its divorce from the Bond and Share System.

In this connection we shall also contend that by the express provisions of Section 11(b)(1) of the Act, holding companies are given the right to retain at least one integrated system as defined in Section 2(a)(29) and such additional systems as the S. E. C. authorizes within the limitations of Section 11(b)(1), thus denying to the S. E. C. the right to liquidate such companies and terminate their existence entirely. This right is further confirmed by Section 11(e) authorizing companies to offer plans of compliance with Section 11(b) and providing for a hearing thereon.

Hearings were commenced on June 18, 1940. The S. E. C.'s case consisted of a mass of documentary evidence upon which an accounting witness presented exhibits in an attempt to support the allegations of the notice and order as to the ratios between values of the holdings of Bond and Share, American and other subholding companies to the consolidated capitalizations of these systems (R., Vol. I, 122-170). At its conclusion the respondents (including American) filed a motion to dismiss (R., Vol. I, 216, 345-353) (which was reserved for determination by the S. E. C. on final submission of the case, and was disposed of by the S. E. C. in its decision (R., Vol. II, 529-531)), and an amended answer (R., Vol. I, 217, 353-385). Both of these documents challenged the sufficiency of the allegations (or proof) offered by the S. E. C. to support an order terminating the existence of American, and the power of the S. E. C. to dissolve any of the respondents, and set forth constitutional and other legal objections to the proposed order.

Thereupon the hearings continued to their conclusion on August 22, 1942. The transcript of testimony covered over 18,000 typewritten pages, and included reference to more than 2,000 exhibits (R., Vol. I, 229). By stipulation of the

parties, all this detailed testimony was not printed, but is part of the record before this Court.

Generally the testimony and exhibits not printed comprised evidence offered by respondents, including American, as to the history, development and accomplishments of their systems, and extensive cross-examination by S. E. C. counsel seeking to minimize these accomplishments, but directed specifically to criticism of their asset accounts from an investment standpoint and seeking to show "write-ups" of capital accounts, and inadequacy of retirement or depreciation reserves as measured by comparisons with allowances or claimed allowances for income tax purposes. To meet this cross-examination, American offered testimony of present values, and a determination of depreciation in, and earnings of, its system companies, which evidence was rejected by the Examiner (R., Vol. I, 234-263) and by the S. E. C. (R., Vol. II, 532).

Further, as an alternative to dissolution, American during the course of the hearings filed a Plan under Section 11(e) of the Act for the reorganization of its system (R., Vol. II, 400-449), and an application for consolidation of hearings upon this Plan with the pending proceedings (R., Vol. I, 385-392).

At the final hearing on August 22, 1942, stipulations were made with counsel for the S. E. C. that the record should be deemed closed, and that the S. E. C. might proceed to enter its findings, opinion and order without further formality. The stipulation waived the filing of requests for findings, and further exceptions thereto, and the filing of briefs or oral argument, but reserved "all legal and constitutional rights, including [the] right to full judicial review of the said findings, opinion and order" (R., Vol. II, 520, 521). The S. E. C. opinion recognizes this reservation (*ib.* 528).

Thereupon and on the same day the S. E. C. filed its Findings and Opinion, concluding that the petitioner here should be dissolved on the statutory grounds of "undue and unnecessary complication of structure," and "unfair and inequitable distribution of voting power," in the Bond and Share System (R., Vol. II, 523-649), and entered its order (R., Vol. II, 650-652) that the existence of American "shall be terminated and that said company shall be dissolved". The Findings and Opinion and the order of the S. E. C. denied American's motion to dismiss, holding that the constitutionality of the statute was not for its determination, and overruled *seriatim* the other contentions of the motion (R., Vol. II, 529-531). They sustained the ruling of the Examiner rejecting evidence of value offered by American (R., Vol. II, 532), and denied the motion to consolidate its application for approval of the Plan submitted by it with the pending proceedings (R., Vol, II, 533). On August 28, 1942, the S. E. C. denied American's petition for rehearing (R., Vol. II, 677-678).

American on October 20, 1942, filed in the Circuit Court of Appeals for the First Circuit its petition for review of the S. E. C.'s order (R., Vol. I, 1-12) upon which the decision (R., Vol. IV, 869-899) and decree of the Court (R., Vol. IV, 900) here under review were entered as hereinbefore stated.

Analysis and criticism of the S. E. C.'s Findings and Opinion, which have been accepted by the Court below as conclusive except upon constitutional issues, is deferred to the argument hereinafter made. It is sufficient to state here that the Findings and Opinion answer in the affirmative the issue posed by the order for hearing, as limited by the subsequent order of June 7, 1940, viz., that the existence of *American* shall be terminated and the company dissolved in order to simplify the structure and

correct distribution of voting power in the *Bond and Share* System, on the ground that the latter company, with a negligible investment, seized at organization and has perpetuated control of *American* (which has about 45,000 public security holders whose securities represent over 95½% of the investment in American and its subsidiaries).

Specification of Errors.

It is submitted that the Court below erred in sustaining the order of the S. E. C. over the following objections:

I. Section 11(b)(2) violates the Fifth Amendment by taking property of American and its security holders without payment of just compensation and without giving security holders the right to notice and a hearing; and the Section cannot be upheld as a reorganization statute (Specification I(b)*).

II. Section 11(b)(2) does not rest, or purport to rest, on the Federal power over interstate commerce, or any other Federal power, and is therefore unconstitutional (Specification I(a)).

III. The drastic grant of power, without standards, contained in Section 11(b)(2) violates the due process clause and is an unconstitutional delegation of legislative power (Specification I(c)).

IV. The order of dissolution violates the due process clause, is not authorized by Section 11(b)(2), and is not supported by substantial evidence:

(a) No standards have been developed or announced by the S. E. C. on the basis of which there is any "unfair or

* These references are to specifications contained in American's petition for the writ of certiorari (pp. 4-6).

inequitable distribution of voting power" or "undue or unnecessary complication of structure" which would be remedied by the dissolution of American (Specification II(c));

(b) To the extent that the order rests on statements in the Findings and Opinion regarding past lawful acts, Section 11(b)(2) is an unconstitutional *ex post facto* law (Specification I(d));

(c) Purported findings relied on by the S. E. C. to support its order are fundamentally defective on their face (Specification II(d));

(d) The order rests on statements in the Findings and Opinion regarding values and violates the due process clause, since American was denied a hearing on this issue (Specification II(b));

(e) The S. E. C. arbitrarily refused to hold hearings on American's voluntary Plan for reorganization (Specification III);

(f) Section 11(b)(2) does not authorize the S. E. C. to direct dissolution of a corporation, an objection which the Court below erred in refusing to consider (Specifications IV and V(a)); and

(g) Dissolution of *American* is an unreasonable, arbitrary and oppressive means of remedying alleged defects in the *Bond and Share* System (Specification II(a)).

Summary of American's Position Before This Court.

The validity of the registration provision of the Act (Section 5) is not challenged. American registered under this provision and thereby became subject to the require-

ments to furnish information regarding itself and its subsidiaries.

Every conceivable activity of American and its subsidiaries since passage of the Act has been, and will be, subject to regulation under the regulatory provisions of the Act (Sections 6-10, 12, 13 and 15 of Title I, and Title II).* The validity of these provisions regulating activities also is not being challenged.

What is here challenged is the validity of Section 11(b)(2) and of the order for dissolution of American.

No one contends that anyone in the situation has violated any law except as the system structure is claimed presently not to conform to the requirements of Section 11(b)(2). The public security holders of American, as contrasted with *Bond and Share,* are not claimed to have committed, prior to enactment of the statute, acts now in any way condemned.

Yet by the order of a Federal administrative agency, the S. E. C., the $270,000,000 solvent corporation, American, which has violated no law, is singled out for dissolution. The consequent taking for a social-economic public purpose of a large amount of property belonging to the corporation and to its public security holders (including (a) the corporation's franchise, its right to exist, its organization and financing costs, the substantial assemblage and going-concern values, and its right to hold its investments and,

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* In Title I, Sections 6 and 7 regulate the issuance and sale of securities by holding companies and their subsidiaries; Sections 8, 9 and 10 regulate all acquisitions of securities and utility assets by holding companies and their subsidiaries; Section 12 regulates all intercompany transactions, sales of utility assets, dividends and proxy solicitation, Section 13 regulates all service, sales and construction contracts; Section 15 regulates the keeping of all accounts and records (except to the extent such regulation is delegated to the Federal Power Commission under Title II); Title II regulates, through the Federal Power Commission, interstate sales of electric energy by operating subsidiaries of a holding company system, as well as their cost accounting in connection with such sales.

(b) the security holders' investments in American) is effected without payment of just compensation. It would take place under a statute giving security holders no right to notice and a hearing.

This taking under the first sentence of Section 11(b)(2)* is not by way of regulating future activities of a holding company system, all of which are regulated in every detail by the other provisions of the Act referred to.

The taking of the property of American and its security holders proceeds on the basis that it will remedy, in the language of the provision, "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" in the *Bond and Share System*. But the taking is not predicated in any way by Congress or by the S. E. C. on such alleged "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" having any effect on interstate commerce, or on the taking having any effect on such commerce.

No standard is set forth in the statute itself as to what is "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure".

If it may constitutionally be left to a Federal administrative agency to develop such standards, it will still be found that the S. E. C. has not developed or announced any standard as a basis for determining that there is in this case any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure." The S. E. C. does not state what features in the Bond and Share System constitute "unfair or inequitable distribution of voting power" or "undue or unneces-

* The "great grandfather" clause, forbidding four-layer systems, consisting of the second sentence of Section 11(b)(2), is not involved in this case.

sary complication of structure." The S. E. C. continuously repeats the statutory phrases, but makes no statement of what they mean. All that can be gathered from its "Findings and Opinion" is that, in the judgment of the S. E. C., the holdings of Bond and Share represent too small a financial interest (less than 4½%) in American or American's own system as compared with the voting power exercised by Bond and Share (20.7%), and that in some cases there are too many layers of securities in the consolidated capital structure of the Bond and Share System.

There is no valid explanation by the S. E. C. why American should be destroyed and its property and that of its public security holders taken to remedy unspecified defects in the Bond and Share System, due entirely to the holding by Bond and Share of 4½% in book value of the stocks of American, or the superimposition of Bond and Share's corporate structure over that of American and the latter's subsidiaries. Obviously American and its system would not be part of or affect the Bond and Share System and the property of American and its public security holders would not be destroyed, if the S. E. C. simply ordered Bond and Share not to vote its small holdings in American or required Bond and Share to dispose of them. The action taken by the S. E. C. is demonstrated to have been arbitrary by its subsequent commencement of a proceeding against Bond and Share to destroy the Bond and Share System entirely by requiring Bond and Share to divest itself of its holdings in its two remaining holding company subsidiaries (Holding Company Act Release No. 4305, May 19, 1943), and by the fact that Bond and Share has itself begun a proceeding before the S. E. C. to divest itself of all its holdings in American (Holding Company Act Release No. 5970, August 6, 1945).

The selection by the S. E. C. of the course of dissolving American is doubly oppressive in light of the legislative history of Section 11(b)(2), which indicates that Congress did not intend to authorize dissolution of any corporation thereunder.

It was arbitrary and oppressive for the S. E. C. to refuse to hold hearings on American's voluntary Plan for reorganization to remove any objections the S. E. C. might have under Section 11 to the corporate structure of American.

The S. E. C. Findings and Opinion do not contain genuine findings of fact. Instead, the S. E. C. terms such figures as it does use "not conclusive."

In place of findings, the S. E. C. sets forth at length (a) the history of action lawfully taken in the past in the building up of the Bond and Share System now deemed to constitute abuses, and (b) statements purporting to have a bearing on values of various security interests in the Bond and Share System, on which latter subject the S. E. C. refused to hear substantial evidence offered by American. Accordingly, the dissolution order of American based on such Findings and Opinion must further be invalid either (a) as an application of Section 11(b)(2) as an unconstitutional *ex post facto* law, or (b) as the result of an adjudication of an issue on which American had no fair hearing.

The order of dissolution, the administrative process through which it was issued, and the statutory provision upon which such process and order were based, are all entirely novel.

Section 11(b)(2) has no apparent relation to any of the delegated substantive powers of the Federal Government such as the interstate commerce power, it contains no acknowledgment of any of the restraints imposed on the

exercise of such powers by the Fifth Amendment, and it lays down no standards by which the action of the agency, the S. E. C., is to be governed.

Under the statute the Federal administrative agency, the S. E. C., has proceeded without any regard to the presence or absence of any jurisdictional findings showing any effect on interstate commerce, without itself developing or announcing any standards in the absence of statutory standards, without making any basic findings to support its order, and without granting a hearing on what apparently was the critical issue in the proceeding. Instead, the Federal administrative agency bears down on action lawfully taken in the past by others than American and its public security holders, and then selects the most oppressive and unreasonable remedy conceivable, directed not against the authors of such action, but against its victims.

If this type of statutory provision and type of process and order can be applied to corporations in the utility field, they can be applied to corporations and individuals in every field.

This is not to quarrel with the provisions of the Act regulating all of the activities of holding companies and their subsidiaries or with the broad concept of the interstate commerce power, including prohibition of acquisition of ownership or control of corporations affecting interstate commerce and the destruction of combinations made in violation of such prohibitions, or with reasonable process by Federal administrative agencies in accordance with valid standards not based on retroactivity, and the selection by them, after fair hearing, of reasonable means of carrying out their Congressional mandates.

The extraordinary statutory provision here involved has been the subject of controversy before the Commission

and Federal courts for the past ten years without authoritative ruling by this Court. It now seems time to examine this novel provision and the administrative process used in its enforcement in all their constitutional aspects.

The Court below did not give dispassionate consideration to the questions presented. Instead, after the lapse of nine months (including a summer recess) following the argument, it rendered an opinion (R., Vol. IV, 869-899), repeating through copious quotations the heated declarations of the S. E. C. regarding the past activities of Bond and Share and giving pragmatic sanction to the action taken by the S. E. C., thus leaving the real questions at issue to be determined by this Court. While it appears that the Court may not have been entirely satisfied either with some of the rulings or conclusions of the S. E. C., or the remedy of dissolution of American to atone for the alleged sins of Bond and Share (R., Vol. IV, 888-890), it deferred in these respects to the "expert judgment" of the S. E. C., and refused to concern itself with the consequences of the order under review upon American or its security holders. Such meager statements of the Court below (and other Circuit Courts of Appeals) as bear upon the real questions presented will be discussed under the respective points.*

None of the constitutional or other questions presented on this petition for review has been passed upon by this

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* We know of no opinions of the Circuit Courts of Appeals having any bearing on the questions regarding Section 11 presented here, other than the decision below in this case, the decision in the *North American* case being simultaneously presented, and the decision in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747 (C. C. A. 3, 1943). The decisions in three other cases involving some of these questions rest expressly upon the opinions in the aforementioned cases, or some of them. *United Gas Improvement Co.* v. *Securities and Exchange Commission*, 138 F. 2d 1010 (C. C. A. 3, 1943); *Engineers Public Service Company v. Securities and Exchange Commission*, 138 F. 2d 936 (C. of A., D. C., 1943); *Central and South West Utilities* v. *Securities and Exchange Commission*, 136 F. 2d 273 (C. of A., D. C., 1943).

Court in relation to Section 11(b)(2) of the Act.* We believe that analogous questions have been passed upon by this Court in relation to other acts and types of proceedings, in each instance with a result favorable to the position taken by American on the questions here.

The S. E. C. may urge upon the Court that a number of proceedings have been had under Section 11, and particularly Section 11(b)(2), in which the orders of the S. E. C. have been consented to or not contested in the courts, or have been sustained in the Circuit Courts of Appeals and no applications for writs of certiorari filed, with a view either of indicating general acceptance of the validity of the Section or that many transactions have been effected on the assumption of validity which might be upset by a contrary holding of this Court.

There would be nothing to such an argument here. The reasons which impelled officers, directors and security holders of various corporations to consent to S. E. C. orders under Section 11(b)(1) or Section 11(b)(2), or not to contest them in the courts or only through the Circuit Courts of Appeals, cannot be examined into and are the subject only of conjecture.** The other branch of the argument would also not be sound. There is no general body of commercial transactions entered into in reliance on the validity of Section 11. All such past transactions have been under

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* Both the majority and minority of this Court expressly stated that constitutional questions were not considered in *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 640, 645 (1945). In that case this Court considered only a narrow point as to the relative rights of holders of preferred and common stock in a liquidation resulting from application of the "great grandfather clause" of Section 11(b)(2), not involved here.

** The power assumed by the S. E. C. in connection with Section 11 proceedings to determine whether the continuance of officers and directors of a holding company was permissible in similar positions with operating subsidiaries or remaining holding companies after the entry of an order under this Section [e. g. Holding Company Act

S. E. C. or court order, and by reason of the doctrine of *res adjudicata* are in no way voidable. Any future transactions must be governed by the principles laid down by this Court in this case.

Nor has American delayed in raising the question of the constitutionality of Section 11. American and Bond and Share tried to raise that question, along with the question of the constitutionality of the registration provisions of the Act, in the first case under the Act decided by this Court in 1938, *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), but were prevented from doing so by the insistence of the S. E. C. that Section 11 was separate from the registration provisions and presented different questions. Since then the time has been taken up with proceedings before the S. E. C. and in the Circuit Court of Appeals, and there has been a lack of a quorum to hear these cases in this Court.

Release No. 5688, March 29, 1945], may well have exercised an influence in some such cases. Also influential may have been the power asserted by the S. E. C. to enter accounting orders substantially impairing the ability of subsidiary companies to pay dividends [e. g. Holding Company Act Release No. 4791, Dec. 30, 1943], and the power asserted by the S. E. C. relating to subordination of securities owned by holding companies to securities outstanding in the hands of the public [e. g. Holding Company Act Release No. 4648, Oct. 29, 1943.]

Furthermore, in many cases dissolution of a holding company is of no great importance to it, because its principal asset is the stock of one other company, and such other assets as it may have are simply vestigial appendages. This was the situation in the *Otis* case cited in the preceding footnote.

The S. E. C.'s Findings and Opinion in this case refer (R., Vol. II, 527) to an order of dissolution of National Power & Light Company entered August 23, 1941, and its acceptance by that Company, but the circumstances there were not analogous to those relating to American. National Power & Light Company had disposed of many of its important properties in the Central Southern States in the area covered by the T. V. A., and believed it could work out its remaining problems under the order of dissolution which it was, therefore, willing to accept.

ARGUMENT.

I. Section 11(b)(2) violates the Fifth Amendment by taking property of American and its security holders without payment of just compensation and without giving security holders the right to notice and a hearing; and the Section cannot be upheld as a reorganization statute.

All the future activities of American and its subsidiaries, if continuing, are regulated by other provisions of the Act, not challenged here (Sections 6-10, 12, 13 and 15 of Title I, and Title II). These are separate and apart from Section 11, the disintegration or reorganization section. Section 11 is also separate and apart from the registration sections of the Act (Sections 4 and 5). That these three portions of the Act are distinct and separate was held by this Court, on the urging of counsel for the S. E. C., in the case which specifically upheld only the registration portion of the Act (*Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938)).*

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* The separability of, and difference between, these three portions of the Act are expressly conceded in the brief of the S. E. C. in the *North American* case which is being simultaneously presented to this Court, viz., page 2.

> "Its [the Act's] major provisions are of three types:
>
> "1. A requirement of registration of public utility holding companies which are engaged in interstate commerce or use the mails;
>
> "2. Substantive regulations of registered holding companies with respect to such matters as the issuance of securities, the sale and acquisition of assets, the payment of dividends, etc.; and
>
> "3. Corporate simplification and integration provisions as contained in Section 11 of the Act."

We here complain of a direct taking of property under Section 11, not of regulation under other provisions of the Act.

(a) The taking of property without payment of just compensation.

The order of dissolution issued by the S. E. C. under Section 11(b)(2) takes the property of American by taking away its corporate franchises, by taking away the right of American to exist under such franchises, by taking away the valuable property inhering in the great costs heretofore incurred of organizing and financing American, and by taking from American its right to retain its investments in the stocks and other securities of its subsidiaries. All of this property of American is of great value.

In addition, the property of the security holders of American is taken—the stocks of American which they hold and, in the case of the debenture holders, their right to retain their 6% debentures of American.*

These direct and separate property interests are not only of great value individually, but taken as a whole they also represent a substantial assemblage and going-concern value.** Dividend paying costs are estimated at probably one-tenth of what they would be if American's present stockholders owned individually stocks in American's subsidiary operating companies, probably $300,000 annually (Tr., 1936-1937). Also, the existence of American similarly saves stock transfer expense which would otherwise be incurred were the stocks of the subsidiaries owned directly by Ameri-

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* One such issue is not now callable by its terms; the other issue is callable by its terms with a premium of 10% (Exs. C-1 and C-2 to U5B registration statement filed by American with the S. E. C. in 1938).

** Hornstein, *Voluntary Dissolution—A New Development in Intracorporate Abuse*, 51 Yale L. J. 64, 69 (1941).

can's stockholders. The existence of American is also valuable to its security holders by permitting them to make diversified investments in the public utility field, which the small investor could not otherwise do.

All this property is under the protection of the Fifth Amendment so far as the Federal Government is concerned, and of the Fourteenth Amendment so far as the state governments are concerned.

This property is taken under Section 11(b)(2) for the declared social-economic purpose of creating theoretically ideal structures in the public utility field, "as a matter of public policy."*

It is of course fully recognized by petitioner that the Fifth Amendment (and the Fourteenth as well) does not exempt property from the effect of regulation under proper exercise of legislative authority. Permissible regulation may result in loss of value to owners of the property not requiring compensation, such loss being regarded under established doctrine as incidental and indirect, provided reasonable results are effected.**

On the other hand, it is also established that a taking in the constitutional sense under the Fifth Amendment does not have to be an actual acquisition of the property by or under government authority, but may consist of the destruction of property. This Court has recently expressly so held in *United States* v. *General Motors Corporation*, 323 U. S. 373 (1945). The Court said, page 378:

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take

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* *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 631 (1945).

** *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944).

> what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."

and, again, at pages 383-384:

> "An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking."

Whatever may be the basis for determining the reasonableness of regulation, it remains clear that the power of "regulation" does not justify destruction of property lawfully acquired and owned and in itself not noxious or offensive, however beneficial that destruction may be supposed to be for the public. This doctrine was applied in a recent unanimous decision of this Court, in which the first Frazier-Lemke Act was held invalid as taking property without condemnation and payment of just compensation in violation of the Fifth Amendment, *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935).

Section 11(b)(2), from the standpoint of the Fifth Amendment, is very similar to the first Frazier-Lemke Act, adopted as part of the Bankruptcy Act, which was held invalid in the *Radford* case. Under the Act, farmers' assets and financial obligations were to be reorganized, because it was deemed by Congress to be in the public interest to leave farmers in possession, and also preferably in ownership, of their lands, and not to have them foreclosed out through inability to meet mortgage obligations.

To this end the first Frazier-Lemke Act provided that a farmer in default on his mortgage could have resort to a court of bankruptcy, which would permit him to remain in possession of his lands. Then the farmer was to purchase the property at its appraised value, through deferred payments over a six-year period, if the mortgagee consented. If the consent were not forthcoming, foreclosure proceedings were stayed for five years, and the farmer remained in possession, paying a "reasonable rental" annually. At the end of five years, or at any time prior thereto, the farmer might pay into court the appraised value of the property in full discharge of the debt. From the mortgagee was taken his property right to have the mortgaged land put up for sale in foreclosure and to receive the price bid at the foreclosure sale or to bid in and retain the property himself if dissatisfied with the price bid on such sale.

That Act applied to vested property rights, that is, to mortgages already existing at the time of the enactment of the Act. In the *Radford* case, this Court held that Act unconstitutional on the ground that it took substantive property rights, which had already vested, from mortgagees. The Court said that while this might well be in the public interest, it was not permissible under the Fifth Amendment to do so without having a condemnation proceeding and paying just compensation to the mortgagee. In other words, the taking of the property rights from the mortgagee was a public taking, for a public economic or social purpose, and it was a violation of the Fifth Amendment to do so without a condemnation proceeding involving payment of compensation.

The public interest had been argued to the Court at length.* The Court said (Mr. Justice Brandeis), pp. 601-2):

> "We have no occasion to consider either the causes or the extent of farm tenancy; or whether its progressive increase would be arrested by the provisions of the Act. Nor need we consider the occupations of the beneficiaries of the legislation. These are matters for the consideration of Congress; and the extensive provision for the refinancing of farm mortgages which Congress has already made, shows that the gravity of the situation has been appreciated. The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. * * * As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual

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* The Court (Mr. Justice Brandeis) itself states that argument as follows (pp. 598-99):

> "(1) The welfare of the Nation demands that our farms be individually owned by those who operate them. (2) To permit widespread foreclosure of farm mortgages would result in transferring ownership, in large measure, to great corporations; would transform farmer-owners into tenants or farm laborers; and would tend to create a peasant class. (3) There was grave danger at the time of the passage of the Act, that foreclosure of farms would become widespread. The persistent decline in the prices of agricultural products, as compared with the prices of articles which farmers are obliged to purchase, had been accentuated by the long continued depression and had made it impossible for farmers to pay the charges accruing under existing mortgages. (4) Thus had arisen an emergency requiring congressional action. To avert the threatened calamity the Act presented an appropriate remedy. Extensive economic data, of which in large part we may take judicial notice, were submitted in support of these propositions."

mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

This Court unanimously reaffirmed these principles in its decision upholding the second Frazier-Lemke Act, which gave mortgagees their fundamental right to have the mortgaged property sold at public foreclosure sale and receive the price bid or, if dissatisfied with the bid at such a forced sale, buy the property in and retain it (*Wright* v. *Vinton Branch*, 300 U. S. 440 (1937)).

To the same effect as the *Radford* case is

Monongahela Navigation Co. v. *United States*, 148 U. S. 312 (1893).

The *Radford* case is emphatically in point here. The Frazier-Lemke Act was a reorganization statute. Section 11(b)(2) has been sought by the S. E. C. to be sustained as a reorganization statute.* The property taken in the *Radford* case was intangible property. Section 11(b)(2) likewise takes intangible property. Like the Frazier-Lemke Act, Section 11(b)(2) is allegedly founded on a public interest, in the case of Section 11(b)(2) the public interest in the form of the structure of public utility holding company systems, or of the corporations making up the systems. The Act here involved recites the national public interest, the interest of consumers, and the interest of investors, and even the interests of the states. It proceeds, as did the Act involved in the *Radford* case, without a condemnation proceeding and payment of compensation.

* That Section 11(b)(2) cannot be sustained as a "reorganization statute" is shown in Point I(c) below.

Are there any points of difference, so far as concerns the application of the Fifth Amendment, between the present case and the *Radford* case which would impel this Court to depart from its holding in the *Radford* case? If there are any differences, they call for the application of the Fifth Amendment in this case more strongly than in the *Radford* case. Insolvency is not required to be present (as it was in the case of the Frazier-Lemke Act) for the S. E. C. to proceed under Section 11(b)(2), and there are not present the safeguards of a right to notice and hearing provided in the Frazier-Lemke Act.*

It is not a distinction which obviates the application of the Fifth Amendement that in the present situation it is charged or found, by Congress or the S. E. C. or both, that prior to the enactment of the Act, public utility holding companies erected their systems by financing arrangements and methods now condemned by Congress or the S. E. C., but not at the time in violation of law.** Could it be successfully contended that the result in the *Radford* case would have been different, if the history of dealings in farm mortgages had shown an oppressive or unsocial, but not illegal, course of conduct by the holders of such mortgages up to the time the Radford mortgage was executed? The point is that the property rights legally existed in the systems at the time of the enactment of the Act. This, in itself, brings into play the requirements of the Fifth

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* The absence from the Act of a right to notice and a hearing for security holders in a Section II(b)(2) proceeding is another ground of unconstitutionality discussed in subdivision (b) of this Point I.

** If property is taken under Section 11(b)(2) because of past acts legal when done, then the Section is an unconstitutional *ex post facto* law as shown in Point IV (b) herein.

Amendment. As this Court said in the *Radford* case (p. 589):

> "Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgagee in specific property, another provision of the Constitution is controlling.
>
> "*Fourth.* The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."*

All the arguments made by those supporting the validity of Section 11 under the Fifth Amendment are made in reliance on decisions of this Court upholding some form of regulation of future activities under the Fifth or Fourteenth Amendments. Such forms of regulation include fixing prices of goods sold, registration or licensing, requiring submission of proposed transactions for approval by administrative agencies, and even prohibiting specified future activities or making their performance illegal and a crime. In the latter category are the cases under the anti-trust laws where this Court has sustained prohibiting performance of certain acts and the dissolution of combinations put together in violation of existing law. We do not challenge such decisions, but they lend no support to Section 11(b)(2) under the Fifth Amendment, for they do not relate to a direct taking of property legally acquired. All the cases which have been cited by the Circuit Courts of Appeals and counsel for the S. E. C. to support Section 11(b)(2) are within these categories, as will appear.

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* *Cf.* concurring opinion of Mr. Justice Murphy in *Hirabayashi* v. *United States*, 320 U. S. 81, 110 (1943): "It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution."

The applicability of the *Radford* case is not overcome by anything advanced in the decisions of the Circuit Courts of Appeals in this or any other cases relating to Section 11.*

The Court below here did not, and could not, question the authority of the decision of this Court in the *Radford* case. Instead, it passed over that case saying only (R., Vol. IV, 896) that "It would indeed be a bit ironical" if the decision were held to be a bar to operations by the S. E. C. under Section 11(b)(2).

The Court repeated the argument of the Circuit Court of Appeals for the Second Circuit in *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148, 154 (C. C. A. 2, 1943) (involving a divestment of some subsidiary stocks under Section 11(b)(1)), to the effect that the taking of property involved, however "painful" to stockholders, is not so "capricious" as to constitute the taking of property without due process (R., Vol. IV, 897).**

This argument is fundamentally unsound on its face. Capriciousness cannot be the test of whether property may be taken for a public use without condemnation and compensation. The ordinary taking for a public use is deliberate and the opposite of capricious. When property is

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* There will be discussed in this Point I (a) only statements in the opinions in the Courts below herein and in the *North American* case being presented simultaneously herewith. The opinion in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747, 753 (C. C. A. 3, 1943), is obviously unsound on this point, for it states merely that the Fifth Amendment can have no application if, as the Court there finds, Section 11(b)(2) is an exercise of the commerce power. This is a direct contradiction of the undisputed principle enunciated by this Court in the *Radford* case and other cases, that all the powers of Congress are subject to the Fifth Amendment.

** Whether or not the taking of property involved in the *North American* case was "capricious", the taking of property involved in the dissolution of American is certainly "capricious", as shown in Point IV (g).

taken for a public highway or a railroad, this is not capriciously done. Property directly in the planned right of way is deliberately selected. The fact that the taking is said to be deliberate, and not capricious, does not mean that the property does not have to be paid for.

If these vested property rights stand in the way of the routes of interstate commerce, then in the exercise of its power over interstate commerce, the Federal Government may remove or take them just as it may remove or take buildings or land in the way of such routes, but the removal or taking must, under the Fifth Amendment, be through condemnation and payment of just compensation.

The Court below made further passing references on this point which do not seem to have great significance. The Court cited (R., Vol. IV, 896) *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 157-158 (1919), but the case has no bearing here. It constituted simply an unsuccessful challenge to the validity of a Federal statute, expressly passed under the war power to improve war production, suspending, after a reasonable period of time, the domestic sale of liquor for the balance of the duration of the first World War.

The Court below cited (R., Vol. IV, 896) two Federal statutes, which are not in any way analogous and which in any event have never been challenged and upheld as to constitutionality by the courts, and a decision also not in point.*

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* Paragraph 11 of Section 5 of the Interstate Commerce Act, as amended by the Emergency Transportation Act of 1933 (now paragraph 4, Section 5 of the Interstate Commerce Act) relates only to (a) effecting common ownership or control of more than one interstate carrier after passage of the Act without approval of the I. C. C., in violation of the Act, and (b) continuing control so effected illegally.

Section 19 of the Banking Act of 1933 simply relates to restrictions on a holding company voting shares of stock in a national bank

The Court also cited (R., Vol. IV, 896) *Block* v. *Hirsh*, 256 U. S. 135, 155-157 (1921). The holding in the case has no bearing here. It upholds the validity of a Federal statute expressly based on the war power, regulating rents in the District of Columbia for two years. However, the statement of this Court (Mr. Justice Holmes), at page 156, is illustrative of a point we are making here. There this Court said in substance that a taking of property could not be disguised as "regulation", citing another statement by this Court in *Martin* v. *District of Columbia*, 205 U. S. 135 (1907) at page 139, to the effect that while a reasonable zoning law limiting the height of *new* buildings might be valid as "regulation", nevertheless if, under the guise of "regulation", the height of new buildings were limited to say 5 feet, it would not be "regulation", but a taking of property requiring condemnation and compensation. *A fortiori*, a purported regulatory zoning law cutting down to zero the height of *existing* buildings would be such a taking. The section involved here is analogous to the latter.

Needless to say, the order of dissolution of American under Section 11 is not regulation. It does not *even purport to be regulation* of future activities for, as already indicated in the introduction to this Point, the regulatory provisions of the Act are entirely separate, being contained in Sections 6-10, 12, 13 and 15 of Title I and in Title II, and regulate every conceivable future activity of companies in a holding company system.

Even if, for the purpose of argument, we assume that these provisions of Section 11 purport to constitute regula-

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owned by it.

In *Lehigh Valley Railroad Company* v. *United States*, 243 U. S. 412 (1917), this Court refused to grant an injunction against an order of the Interstate Commerce Commission under Section 11 of the Panama Canal Act. No constitutional question was raised; the only question was a review of the judgment of the Commission as to whether the railroad company was in competition with a steamship company.

tion, such regulation would be of the type adverted to by this Court in *Block* v. *Hirsh* and *Martin* v. *District of Columbia*, just referred to, masking a taking of property, which requires condemnation and payment of compensation.

True regulation can only relate to future activities,* not to taking or destruction of static, existing property. Con-

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* Thus the statements made by this Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944) regarding an incidental loss of value through regulation relate only to true regulation of future activities, i.e., the rates to be charged by a public utility. This also applies to the statements of this Court in *Bowles* v. *Willingham*, 321 U. S. 503 (1944), involving wartime rent control, and in *Yakus* v. *United States*, 321 U. S. 414 (1944) involving wartime meat price controls. In its opinion in the *Yakus* case, this Court in passing and in reference to the constitutionality of the use by the Federal Government of its wartime powers mentioned *Miller* v. *Schoene*, 276 U. S. 272 (1928). That case rested squarely on the principle of the constitutionality of prevention or destruction of a *tangible nuisance or pest*, as shown by the authorities cited in the Court's opinion in *Miller* v. *Schoene*, as sustaining the decision. The case itself upheld the constitutionality of the destruction of cedar trees which were the host of an infectious plant disease, and the decision of the Court rested expressly on the authority of the tangible nuisance cases, viz:

Hadacheck v. *Los Angeles*, 239 U. S. 394 (1915) prohibiting manufacture of bricks in certain city districts;

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365 (1926), where an ordinary zoning ordinance as to types of buildings in districts was upheld against a complaint by an owner of unimproved land;

Fertilizing Co. v. *Hyde Park*, 97 U. S. 659 (1878) upholding a municipal ordinance forbidding making of fertilizer from offal in a city area;

Northwestern Laundry v. *City of Des Moines*, 239 U. S. 486 (1916), upholding a city ordinance against generating a smoke nuisance.

Sligh v. *Kirkwood*, 237 U. S. 52 (1915), upholding a Florida state law against shipment of green and inedible citrus fruit;

Reinman v. *Little Rock*, 237 U. S. 171 (1915), upholding a municipal ordinance against conducting a livery stable in certain city districts.

Whatever the application of the doctrine of *Miller* v. *Schoene* and like *tangible nuisance or pest cases* may be to the constitutionality of the exercise of wartime powers involved in the *Yakus* case, the doctrine has no application to the sort of intangible property involved

sequently, the implication in the opinion of the Court below (along with that Court's citation (R., Vol. IV, 897) of *Nebbia* v. *New York*, 291 U. S. 502, 527 (1934)) that the taking resulting from the application of Section 11(b)(2) here may be only a business loss incidental to "regulation", is wholly untenable.*

This distinction regarding the taking or destruction of property here involved as contrasted with regulation of future activities, can be simply put, so that no circuitous form of words can cloud it. Insuring against future acts of an individual *by executing a death sentence on that individual*, and taking away all his property, is not "regulation" of that individual. Similarly, it is not "regulation" to insure against performance of future acts of a corporation *by executing a death sentence on the corporation* and taking away all its property.

The applicability of the *Radford* case is not overcome by what has been approved by this Court in the cases under the anti-trust laws. The Court below cited (R., Vol. IV, 894, 896) a case under the anti-trust laws as if such cases sustained the taking involved here, *Northern Securities Co.* v. *U. S.*, 193 U. S. 197 (1904). In that case stocks of two competing railroad companies had been placed in a holding

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in the present case, which cannot constitute a tangible nuisance or pest. The property involved here, i. e., stocks and bonds, assemblage and going-concern value, organizing and financing cost, cannot be in itself noxious or a pest. If there is any evil in the situation it can only be due to the identity of the owner or owners. Consequently, an effort to affect the ownership must inevitably constitute a taking of property from the present owner by transferring it to a new owner or destroying it. Under no concept can such taking be deemed the abatement of a tangible nuisance or pest.

* The decision in *Nebbia* v. *New York* simply represents the final rejection by this Court of the proposition that only businesses "affected with a public interest" can be regulated by a legislature under the police power. The case involved nothing but true regulation of future activities, that is, sales prices of milk, by the New York Legislature.

company in direct violation of existing anti-trust laws, and the combination was put asunder. Such a case is no precedent here where no law has been violated, or statutory prohibition transgressed.*

The Court below also cited (R., Vol. IV, 896) another case where property was destroyed as a penalty for operation in violation of existing law, *Mugler* v. *Kansas*, 123 U. S. 623, 668-670 (1887). There a brewery was operated in violation of existing state law and its destruction as a penalty was upheld. Such cases also have no application to the present situation, where no law has been violated.**

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* Other cases under the anti-trust laws which have been cited by counsel for the S. E. C. are also not in point:

United States v. *Reading Co.*, 253 U. S. 26 (1920), *Continental Insurance Co.* v. *United States*, 259 U. S. 156 (1922) (further proceedings in same case), *Standard Oil Company* v. *United States*, 221 U. S. 1 (1911) and *United States* v. *American Tobacco Company*, 221 U. S. 106 (1911) are cases entirely similar to *Northern Securities Co.* v. *U. S.*, where properties had been put together in violation of anti-trust laws and were ordered put asunder. This Court recently recognized that the *Reading* and *Continental* cases, representing penalties for willful violations of existing anti-trust laws, were not precedents under the Public Utility Holding Company Act, *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 639 (1945).

United States v. *Delaware, Lackawanna and Western Railroad Company*, 238 U. S. 516 (1915), *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257 (1911) and *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366 (1909), involved the commodity clause of the Hepburn Act, which forbade the handling in interstate commerce by a carrier of coal owned or controlled by that carrier. While, as a result it might turn out to be more profitable for a carrier voluntarily to divest itself of the coal mines, so that it could transport the coal therein when owned by another, rather than to retain the mines and not haul the coal, the statute did not require divestment, but only regulated future acts and made them illegal.

** Counsel for the S. E. C. have frequently cited other cases sustaining regulation of future activities which are, for that reason, not in point here:

Austin v. *Tennessee*, 179 U. S. 343 (1900) where a state prohibited the sale of cigarettes, and the cigarettes involved came into the state after the law was passed;

Lawton v. *Steele*, 152 U. S. 133 (1894) where it was held that fish nets set out in violation of existing state law might be seized and destroyed as a penalty;

In the portion of the decision in the *North American* case quoted by the Court below here (R., Vol. IV, 897), there is an implication that compelling a corporation to dispose of property through sale or distribution to stockholders may not be a taking, because there may be no loss. The observation is not only inapplicable to a large portion of the property taken in the present case, but is in itself unsound. In the *North American* case it was ordered only that the holding company divest itself of the common stocks of some of its subsidiaries. In the present case the order results in (a) a divestment by the holding company of all of its subsidiary stocks, and (b) taking away from the security holders of American the securities they hold which were issued by American, and taking from American and destroying the millions of dollars of property represented by the organization and financing expenses inhering in the existing setup of the holding company. We have also mentioned the value inhering in American from its ability to effect savings in dividend paying and stock transfer costs, and from its being a medium for diversified investment. The observation of the Court in the *North American* case is applicable only to

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Booth v. *Illinois*, 184 U. S. 425 (1902) and *Otis* v. *Parker*, 187 U. S. 606 (1903) where states prohibited the making in the future of certain types of contracts;

Rast v. *Van Deman & Lewis Co.*, 240 U. S. 342 (1916), involved the imposition by a state of a license tax on merchants thereafter using profit sharing coupons in their selling activities;

Wickard v. *Filburn*, 317 U. S. 111 (1942), involved regulation of the sale and use of commodities;

United States v. *Darby*, 312 U. S. 100 (1941), involved regulation of wages paid to employees producing goods;

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 43 (1937), involved regulation of labor relations of employers producing goods;

Chicago Board of Trade v. *Olsen*, 262 U. S. 1, 40 (1923), involved regulation of future transactions in grain on an exchange;

Stafford v. *Wallace*, 258 U. S. 495 (1922), involved regulation of future transactions relating to stockyards;

Louisville & Nashville Railroad Co. v. *Mottley*, 219 U. S. 467

a portion of the taking mentioned in (a) above. It can have no application to the taking mentioned in (b) above where there is no possibility of any salvage.

Even as to the taking mentioned in (a) above, that is, the divestment by the holding company of subsidiary stocks by forced sale, proceeds of forced sales cannot be the equivalent of the just compensation required by the Fifth Amendment.

If this kind of taking is permitted under Section 11 under the guise of "regulation", then the Federal Government when interstate commerce is affected, or any state government, may decree that an existing corporation, which was not set up in violation of any law (whether it be an agricultural corporation or a railroad corporation or a church or a university),* or an individual, is deemed to have

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(1911) and *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897), where certain future acts were prohibited and it was held that the performance of such acts under existing executory contracts could be prohibited since obviously one cannot by contract made before enactment of a statute legalize performance after passage of the statute of acts validly prohibited thereby.

The *Gold Clause* cases referred to by this Court in another connection in a recent case involving the Act, *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624 (1945) are similar to the two last cited cases, and are also not in point here. In the *Gold Clause* cases (*Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240 (1935)), executory contracts provided for future performance of acts, that is, the delivery of a specified weight of gold in lieu of such United States currency as might be declared legal tender by Congress. The performance of such acts, being made illegal by Congress in the exercise of its power over the currency, could not be legalized simply by pre-existing executory contracts. The Joint Resolution there involved was upheld as not violating the Fifth Amendment on the express ground that it affected executory contracts, 294 U. S. at pp. 306-311. We have here vested property rights in the ownership of stocks and bonds, in the organization and financing costs of American, and its value as a going-concern, not in any respect executory contract rights.

* Any protection against true *regulation* heretofore deemed to be afforded property or businesses or institutions not "affected with a public interest" was finally dissipated by the decision of this Court in *Nebbia* v. *New York*, 291 U. S. 502, 536 (1934), *supra*.

too much property and must sell all or most of it within a year to those who may wish to buy it. The Fifth Amendment must be a protection against such a taking of property. If Government is to require owners to part with their property for a public purpose, then, under the Constitution, Government must condemn the property and pay just compensation.

(b) The taking of property of security holders without giving them the right to notice and a hearing.

It is fundamental that it is a violation of the due process clause of the Fifth (or Fourteenth) Amendment for a government to take property without giving the owner thereof the right to notice and a hearing.

There is no provision in Section 11(b)(2), or elsewhere in the Act, giving the holders of the securities of American, whose securities issued by American are taken from them by an order entered under Section 11(b)(2), the right to notice and a hearing. There is a provision in Section 19 of the Act *permitting* the S. E. C. to grant security holders a hearing before the S. E. C.* There is no provision whatever in the Act regarding a hearing for security holders before a Federal court.

This Court has held that extra-official notice of a hearing, or a hearing granted as a matter of favor, is not a substitute for the right to a hearing required by the due process clause. In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424-5 (1915) in condemning the absence of a statutory requirement of a hearing for stockholders, this Court said:

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* The word "may" in this section cannot be construed as mandatory because, in the same sentence, it is provided that the S. E. C. *shall* admit as a party any interested state, state commission or political subdivision of a state.

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. • • • 'It is not enough that the ...rs may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court."

Similarly, it has been held by this Court that actual notice given as a matter of discretion does not meet the due process requirement that notice be mandatory under the statute. *Wuchter v. Pizzutti,* 276 U. S. 13, 24 (1928).

On this point, the Court below merely called attention (R., Vol. IV, 898) to the fact that the S. E. C. published notice and an invitation to be heard in the Federal Register, which does not meet the rulings of this Court just cited, and then quoted a passage from the decision of the Circuit Court of Appeals for the Third Circuit in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission,* 134 F. 2d 747, 753 (C. C. A. 3, 1943), involving involuntary reclassification of stock under Section 11(b)(2). The statement of that court is to the effect that a complaint about stockholders not having a right to be heard is premature in a Section 11(b)(2) proceeding before the S.E.C., and that stockholders would have an opportunity to assert any objections, including lack of due process, in the District Court in subsequent proceedings relating to the carrying out of the S. E. C. order. This observation of the Circuit Court of Appeals for the Third Circuit, cited with approval by the Court below here, is unsound because the S. E. C. has contended, and the courts have held, that, at a later stage of such a proceeding, such an objection is too late.

For example, in *New York Trust Co.* v. *Securities and Exchange Commission,* 131 F. 2d 274 (C. C. A. 2, 1942), cert. den. 318 U. S. 786 (1943), rehearing denied 319 U. S. 781 (1943), the S. E. C. contended, and the court held, that in a later stage of a Section 11(b)(2) proceeding before the S. E. C. itself, where security holders had been permitted by the S. E. C. to appear pursuant to Section 19 of the Act, it was too late for them to question the prior entry in the same proceeding, when the security holders had not been parties, of a *dissolution order* of the corporation there involved which had not been contested by the corporation. The S. E. C. seems to contend in these cases that it is either too early or too late to raise such objections regarding its orders, or that the wrong party raises them.

Compare also the recent position taken by the S. E. C., and upheld by the Circuit Court of Appeals for the First Circuit, that American, as 100% stockholder of one of its subsidiary public utility operating companies, was not a "person aggrieved," with a right of court review of an accounting order issued against the subsidiary company but affecting only American from a monetary standpoint, a contention rejected by this Court in *American Power & Light Company* v. *Securities and Exchange Commission,* 65 S. Ct. 1254 (June 4, 1945).

In connection with this absence of a right to notice and a hearing, it must be borne in mind that the property of the security holders of American is directly taken, i. e., their stock and debentures issued by American, apart from the vital indirect interest which such security holders have in the taking and destruction of American's own property.

Moreover, the determination of the S. E. C. that American must be destroyed and the property of its security

holders in American taken away, was based on some sort of evaluation by the S. E. C. of the relative interests of the public holders of various classes of securities issued by American—debentures, preferred stocks and common stock, and the relation of such values to the values of the various holdings of securities in American by Bond and Share, and the values of the various security issues of the subsidiaries of American.

It seems fundamental that in order to comply with the due process clause, the persons directly affected must be given an opportunity at a hearing to examine and rebut the evidence introduced by the Commission on such an issue,—a right not accorded by this Act.

(c) Section 11(b)(2) cannot be upheld as a reorganization statute.

We desire here simply to refute a basis upon which the S. E. C. has on occasion sought to sustain Section 11, that is, as a "reorganization statute." There are two principal reasons why the section cannot be sustained on that basis.

(1) Compulsory involuntary reorganization, where no illegal act has been committed, can only take place through the exercise of the bankruptcy power.* No other source of power for such a reorganization is to be found in the Constitution.

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* So-called reorganizations in equity are simply foreclosures under the exercise of a mortgagee's contractual power to compel the sale of the mortgaged assets or are in the nature of execution sales to satisfy creditors' claims. The creditor then takes his share of the price or has the option of taking securities in a new corporation, which acquires the assets of the old. Even this type of reorganization is not effected unless the debtor company is in financial distress.

The exercise of the bankruptcy power in such a case is dependent on the *insolvency,* in either the bankruptcy or equity sense, of the subject.

> *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935);
> *Wright* v. *Union Central Life Insurance Co.*, 304 U. S. 502 (1938).

In the *Continental Illinois* case this Court said as to the bankruptcy power (p. 670):

> "Judge Cowen, in *Kunzler* v. *Kohaus,* 5 Hill 317, 321, a decision which was approved by this court in *Hanover National Bank* v. *Moyses* [186 U. S. 181], *supra,* said that the power was the same as though Congress had been authorized 'to establish uniform laws on the subject of any person's general inability to pay his debts * * *' ".

In the *Wright* case this Court said (pp. 513-514):

> "The subject of bankruptcies is nothing less than 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.' This definition of Judge Blatchford, afterwards a member of this Court, has been cited with approval here."

(2) The Section cannot be sustained as a reorganization statute because it does not contain the two minimum safeguards which every bankruptcy act must contain in order to comply with the due process clause. The two fundamental safeguards are a provision giving security holders the right to notice and a hearing, and a provision for vote or consent of security holders.

The absence of the first safeguard is discussed in Point I(b) above.

As to the lack of a provision for vote or consent of security holders, this Court said in the *Radford* case that the substantive rights of the mortgagee could not be adversely affected without the mortgagee's consent, or without the consent of the class to which the mortgagee belonged and the approval of a court, viz., 295 U. S. 585-6:

> "Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of Paragraph 7. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy—an agreement which 'originates in a voluntary offer by the bankrupt, and results in the main, from voluntary acceptance by his creditors.' * * * In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court."

II. Section 11(b)(2) does not rest, or purport to rest, on the Federal power over interstate commerce, or any other Federal power, and is therefore unconstitutional.

No issue is raised here, such as has been the subject of much recent litigation, of the extent of the concept of interstate commerce as a proper subject of Federal legislation. Recent decisions extending the concept of interstate commerce are not challenged. Nor is any issue raised here as to the Federal Government's right to impinge on matters heretofore left to the states, when a Federal power is being exercised.

The point at issue is that Section 11(b)(2) on its face does not purport to be an exercise of any Federal power, such as the power over interstate commerce, and the dissolution order against American is not based on even a purported jurisdictional finding by the S. E. C. that interstate commerce is affected, beneficially or otherwise. There is no claim that the Section is based on any other Federal power.

Section 11(b)(2) is made applicable by its terms to American, as the Court below stated (R., Vol. IV, 891), only because (a) American is by statutory definition a subsidiary company* of a registered holding company (Bond and Share), and (b) American is itself a registered holding company. Bond and Share and American registered under Section 5 of the Act for the reason that they incidentally used instrumentalities of interstate commerce from which, without registration, they would have been excluded by Section 4(a) of the Act. The requirement of registration by reason of such incidental use of such instrumentalities was upheld by this Court on the ground that such use entitled Congress to obtain data regarding the companies in the Bond and Share System for the purpose of future legislation. As previously stated, upon the urging of counsel for the Securities and Exchange Commission, this Court held that (a) the registration provisions were separable from (b) the regulatory provisions and (c) the disintegration and reorganization provisions of the Act, and that its decision upholding the registration provisions did not determine the validity of other por-

* Since Bond and Share holds more than 10% of the voting shares of American (Section 2(a) 7-9). Bond and Share has 20.7% of the voting shares, representing 4½% of book value of such shares.

tions of the Act. *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938).*

The Court below conceded (R., Vol. IV, 891) that Section 11(b)(2) "contains no reference to interstate commerce."

The Section does not provide that the S. E. C. is to operate thereunder on any company or system by reason of that company or system being in interstate commerce, or on the ground that any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" (the controlling phrases in the Section) in that company or system affects commerce, beneficially or otherwise. No finding to that effect by the S. E. C. is provided for in the Act and no such finding by the S. E. C. was made in this case. Nor is such a finding made by the S. E. C. in other cases under Section 11.

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* The basis on which the draftsmen obviously hoped originally that so unlimited a statute might be sustained was that registration (which subjects companies to Section 11(b)(2) by statutory definition), although compelled as a practical matter by the devices in the Act, would be regarded by the Courts as at least *theoretically optional* (the option being to go out of business) so that the Courts would accept registration as submission and not review the compulsion exerted. However, after passage of the Act and before the *Electric Bond and Share* case was decided by this Court, this theory was abandoned by the S. E. C. and the Government attorneys representing it, for the reason that they wished to argue that the registration provisions were separable from the remainder of the Act and sustainable on the narrow grounds heretofore stated. (It seems to us that this position could only have been adopted because of recognition of the vulnerability of Section 11 to attack in respect of its constitutionality.) In the *Electric Bond and Share* case this Court held that registration was not *voluntary*.

While the argument has been made by the S. E. C., we think that it will no longer be seriously contended that the definitions in Section 2 of the Act, as to what companies must register under the Act and thereby become subject to Section 11, in any way limit the application of Section 11 to matters affecting interstate commerce. This matter is discussed in the brief of *amici curiae* in the *North American* case, pp. 17-19.

The Court below sought to support the dissolution order issued under Section 11(b)(2) here as an exercise of the interstate commerce power on three propositions, which will be dealt with in order.

(a) The S. E. C.'s argument based on the alleged exemption in Section 3(a).

In the *North American* case in the Circuit Court of Appeals for the Second Circuit, the S. E. C. came forward for the first time with the proposition that Section 3(a) of the Act contained a provision whereby a company could, on application to the S. E. C., obtain exemption from the Act as a whole if it were not in or affecting interstate commerce, that the company there involved had not applied for and been granted such an exemption, and that this resulted in limiting application of Section 11 of the Act to a company in or affecting interstate commerce. The same proposition was put forward by the S. E. C. as to American in the present case in the Court below, and was adopted by the Court.

But the proposition, based on Section 3(a), is on the face of that Section untenable.* The test of exemption

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* "Sec. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

"(1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

"(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;"

(There are three additional subdivisions to Section 3(a), but the S. E. C. does not claim that these three other subdivisions have any bearing.)

under Section 3(a) does not relate to interstate commerce and does not depend on a company being in or affecting interstate commerce. As conceded by the Court below, the introductory clauses of subsection (a) contain a condition precedent to exemption under any of the following subsections, which condition does not depend on a company not being in interstate commerce or affecting interstate commerce. Even if the test of the following subsections can be met by a company, exemption is still to be denied by the S. E. C. under the introductory clause "insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers."

As to this difficulty on the face of the exemption provision, the S. E. C. urged that it had "ruled" that the quoted clause would not be used to deny exemption, unless the exemption would be detrimental to the interests of the public or of investors or consumers by reason of activities of the applicant in interstate commerce or affecting interstate commerce. The Court said (R., Vol. IV, 892-893) "This interpretation by the Commission is entitled to great weight and should be accepted by the courts."

This is not the sort of statutory interpretation in which the courts yield to an administrative body. There is no ambiguity in the statutory provision and no language whatsoever upon which this interpretation by the S. E. C. could be based. It relates to a clear cut question of law and governs constitutional rights. *Dobson* v. *Commissioner,* 320 U. S. 489, 502 (1943); *Bingham's Trust* v. *Commissioner of Internal Revenue,* 65 S. Ct. 1232 (June 4, 1945).

The language of this exemption provision would certainly not lead any one to believe that a company could obtain exemption thereunder solely on a showing of not being engaged in or affecting interstate commerce.

The reason for this circuitous reliance on this exemption provision in Section 3(a) of the Act is not apparent.

The S. E. C. might just as well have asserted that it construes the pivotal Section 11(b)(2) itself as being applicable only to companies in or affecting interstate commerce or only if the "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" affects interstate commerce, and that it operates on a company under Section 11(b)(2) only if the operation will affect interstate commerce.

Yet, the S. E. C. strenuously resists being forced to any such interpretation of the pivotal Section.

Whether or not this proposition of the S. E. C. and the Court below relating to the S. E. C.'s interpretation of the "insofar" clause in the introductory provision to subdivisions (1) and (2) of paragraph (a) of Section 3 is correct, it does not go far enough to carry their argument. To obtain exemption, a company must not only qualify under the "insofar" clause, but also meet the succeeding test in subdivision (1) or subdivision (2). The difficulty from the standpoint of the S. E. C.'s argument is that a company cannot qualify under either such subdivision merely by reason of not being in or affecting interstate commerce. Under subdivision (1) a holding company which is seeking exemption, and every public utility subsidiary company thereof from which it gets income, must carry on business "substantially in a single State in which such holding company and every such subsidiary company thereof are organized." So far as we know, it has not heretofore been urged successfully that a company is in or affects interstate commerce by reason of the fact that some other company in which it holds securities is incorporated in another state.

Subdivision (2) need not be discussed, for it is simply not available to an ordinary holding company, but only to a holding company which is predominantly a public utility operating company.

Consequently, even should this Court follow the Court below in accepting the S. E. C.'s interpretation of the "insofar" clause of the introduction to Section 3(a), the exemption of Section 3(a) is still not available by reason of a company not being in or affecting interstate commerce in view of the conditions of subdivisions (1) and (2).

(b) The S. E. C.'s argument based on the findings contained in Section 1.

The Court below also accepted a proposition first put forward by the S. E. C. in the Circuit Court of Appeals for the Third Circuit, and adopted by that Court, in *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747, 753 (C. C. A. 3, (1943), a case argued prior to the *North American* case.* This proposition is that Congress allegedly found in Section 1 of the Act that "unfair or inequitable distribution of voting power" and "undue or unnecessary complication of structure" in holding company systems *often* affect interstate commerce, and that such distribution of voting power and complication can therefore be remedied in *all* cases, irrespective of whether they have any effect on interstate commerce, and irrespective of whether the operation performed as a remedy affects interstate commerce, beneficially or otherwise.

The Court below here also held (R., Vol. IV, 893-894) that, in view of this assumed finding by Congress in Section 1 of the Act, it was not necessary for the S. E. C. itself to find that the alleged "unfair or inequitable distribution of voting power", or "undue or unnecessary complication of structure" in this case, or the dissolution of American,

* The S. E. C. had not invented the Section 3(a) exemption proposition at the time of the argument of the *Commonwealth & Southern* case.

had or would have any effect on interstate commerce. The Court below then cited (R., Vol. IV, 894), in support of the proposition, four cases decided by this Court.

There are two conclusive objections to the proposition. (1) Section 1 of the Act does not contain findings by Congress to the effect claimed by the Court below. (2) The decisions of this Court cited in support of the proposition are clearly not in point; and the proposition, if sustained, would destroy any limitation on the Federal Government requiring it to legislate only in the exercise of its delegated constitutional powers, such as its power over interstate commerce.

(1) Obviously, to sustain even the basic premise for this proposition of the Court below, there must be discovered in Section 1 of the Act a finding by Congress that the "unfair or inequitable distribution of voting power" and the "undue or unnecessary complication of structure" of holding company systems "often" affect interstate commerce. But a reading of Section 1 makes it plain that there is no such finding contained therein. In fact, it is apparent that Section 1 does not contain any finding by Congress intended to support Section 11 of the Act, but only findings intended to support the regulatory and registration portions of the Act in Title I and Title II, and possibly the Natural Gas Act. The following resume of the clauses in Section 1 demonstrates the correctness of our assertion:

> Clause (1) of subdivision (a) of Section 1 contains findings only that securities of companies in public utility holding company systems are widely marketed through use of instrumentalities of interstate commerce, a matter regulated in Sections (6) and (7) of Title I of the Act.

In clause 2 of subdivision (a) there is a finding that servicing arrangements are "often"* made or performed by use of instrumentalities of interstate commerce, a matter regulated by Sections 12 and 13 of Title I.

Clause 3 of subdivision (a) contains a finding that electric energy and gas are often transported by use of instrumentalities of interstate commerce, a matter regulated (as to electricity) by the Federal Power Commission under Title II of the Act and (as to gas) under the Natural Gas Act.

In clause 4 of subdivision (a) there is a finding that the practices of public utility holding companies and their subsidiary companies in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage, a matter regulated by Title I of the Act and by the Federal Power Commission under Title II of the Act.

Clause 5 of subdivision (a) contains a finding that the activities of public utility holding companies and their subsidiaries in many states make effective state regulation difficult.

Subdivision (b) of Section 1 contains no reference whatsoever to interstate commerce. It relates only to activities which are stated to be adverse to the interests of various classes of the public, if not regulated, and which are regulated under the Act

* We should mention that the legislative history of the Act demonstrates that the word "often" was deliberately chosen by Congress and that Congress rejected the proposal that it make a broader statement. When the original bills were introduced, clauses 2, 3 and 4 of what is now Section 1(a) did not contain the word "often". For example, what is now clause 2 read: "Their [public utility holding companies] service, sales, construction, and other contracts and arrangements are made and performed by means of the mails and instrumentalities of interstate commerce." However, the Act as passed months later interpolated the word "often" in these clauses, thus rejecting the findings proposed by the sponsors of the original bills.

by the regulatory provisions of Title I or under Title II.

Subdivision (c) of Section 1 is in three parts, divided by semi-colons. The first part is a finding, and the second and third parts are declarations of policy. There is no finding whatsoever in the second and third portions of subdivision (c). The finding in the first portion is only a repetition that due to the abuses enumerated in subdivision (b) "the holding company", if unregulated, is injurious to the public. Moreover, obviously, the finding is made in order to support regulation of the activities previously enumerated, a function performed by the regulatory provisions of Title I of the Act and Title II of the Act. (Since there are no findings in the other two portions of subdivision (c), they have no bearing on the point here discussed.*)

It is therefore plain that there is no basis for the premise of the Court below that Congress made a finding in

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* Attention may be called to the portion of the statement of policy of Congress contained in the second clause of subdivision (c) that the Act is to be interpreted "to meet the problems * * * enumerated in this section, connected with public-utility holding companies *which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce.*" If it has any bearing here, the clause can only express the intent of Congress that application of the Act be directed and limited to matters which are found by the S. E. C. to affect interstate commerce and which are therefore a proper subject of the exercise of Federal power. The S. E. C. has consistently construed the Act as not requiring any such finding in connection with the application of Section 11, and there is no such finding in this case. For example, in its brief in *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148 (C. C. A. 2, 1943), the S. E. C. argued that a condition in Section 1(c) of the Act did not limit operation by the S. E. C. under Section 11(b)(1) and in that connection stated (p. 26):

> "We think it perfectly clear that Section 1(c) imposes no such conditions. Section 1 states the policy and objective of Congress, but itself is not regulatory. The provisions for the application of these standards are supplied elsewhere in the Act. The provision presently relevant is Section 11(b)(1). That section requires divestment of properties unless they are affirmatively shown to meet specific conditions."

Section 1 of the Act to the effect that "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" of a public utility holding company system even "often" affect interstate commerce.

(2) Assuming, however, for the purpose of argument, that the findings in Section 1 of the Act amount to a finding that "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" of public utility holding company systems "often" affect interstate commerce, such a finding could not, under the decisions of this Court, cited by the Court below, support the indiscriminate application of Section 11(b)(2) whether or not there is found to be any effect on interstate commerce.

The Court below relied on *Stafford* v. *Wallace*, 258 U. S. 495, 520-521 (1922) and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 40 (1923). In the *Stafford* case this Court upheld a Federal statute authorizing regulation of future activities and transactions relating to a stockyard, and in the *Chicago Board of Trade* case a Federal statute authorizing regulation of future transactions in grain on an exchange known as the Chicago Board of Trade. This is a species of regulation of future activity by use of instrumentalities of commerce and the mails entirely analogous to the regulation of future activities by the regulatory portions of the Act not here involved. There is no analogy to the present application of Section 11(b)(2). The stockyards and exchange were not abolished or their property ordered sold or destroyed.

It was pointed out in those cases that while the overwhelming portion of the transactions in the stockyards and on the exchange were through use of instrumentalities of commerce or the mails or in interstate commerce, there

might be some transactions purely intrastate which would come under regulation. There it was contended that this invalidated the statutes involved. This Court held, however, that there was such an intermingling of transactions that separation of the purely intrastate transactions was impracticable, and that regulation of all transactions was, therefore, an "appropriate means" of regulating the overwhelming majority of interstate transactions.

Such justification of the application of those statutes, merely regulating future activities as an "appropriate means" under the circumstances of regulating a mass of future interstate transactions intermingled with intrastate transactions, may have application to the similar regulatory provisions of the Public Utility Holding Company Act, but can have no application to Section 11(b)(2).

Here it is obviously practicable for the Federal administrative agency to consider and find whether the attributes mentioned in the two controlling phrases in the first sentence of Section 11(b)(2) of the static ownership of property rights substantially affect interstate commerce in any particular case, and whether the remedy to be applied substantially affects interstate commerce in a particular case. Here also it is demonstrated by Congressional enactment that there are other "appropriate means" for regulating future transactions affecting interstate commerce whether or not mingled with purely intrastate transactions,—the regulatory provisions of the Act.

Moreover, the means employed here must be considered to see if they can be deemed "appropriate". The execution of a "death sentence" on property rights without regard to any effect on interstate commerce, under Section 11(b)(2) as construed by the S. E. C., to ensure that there will be no future activities of any kind, as contrasted with reg-

ulation of such activities, cannot be an "appropriate means" of exercising the power over interstate commerce.*

The two other cases** cited by the Court below in this connection have no application. They represent refusals by this Court to upset findings by the National Labor Relations Board that activities of the subject companies had a substantial effect on interstate commerce, as a basis for exercising jurisdiction over their labor relations.

Nor is the present case analogous to cases in which this Court has upheld the regulation by Congress through an administrative agency, e.g., the Interstate Commerce Commission, of activities admittedly purely intrastate which are found to have a substantial effect on interstate commerce.***

This Court has recently held that, when Federal power is exercised within what would normally be the domain of state power, the justification must appear affirmatively and not rest on inference, *Yonkers* v. *United States*, 320 U. S. 685 (1944). In the present case matters of corporate

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* While this Court has held the making of insurance contracts to be interstate commerce sufficient to subject the insurance companies to the Federal power over interstate commerce (two Justices holding that only the activities of insurance companies in interstate commerce were subject to regulation under the Federal power) *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944), we do not believe that any of the Justices would hold that the ownership of the property involved here is commerce of any sort. Nor is the present case in any way analogous to *Polish Alliance* v. *Labor Board*, 322 U. S. 643 (1944) where this Court refused to upset a finding by the Labor Board that the business activities of a company did have a substantial effect on interstate commerce, as a basis of jurisdiction over its labor relations. There is no such finding by the S. E. C. in the present case as a basis of its exercise of jurisdiction.

** *National Labor Relations Board* v. *Jones & Laughlin*, 301 U. S. 1, 43 (1937); *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 221-222 (1938).

*** The *Shreveport* cases, 234 U. S. 342 (1914).

structure, voting power and the dissolution of state corporations would certainly seem to be matters ordinarily within the domain of state power, and justification of the exercise of Federal power certainly does not appear affirmatively, either from the statute itself or from the Findings and Opinion of the S. E. C.

The presence of a substantial effect on a subject matter of Federal power is a prerequisite to constitutionality. Expressed another way, Federal legislation must at least be directed to an exercise of a Federal power to be constitutional.

(c) The S. E. C.'s argument based on the separability clause in Section 32.

In passing, the Court below, as a third proposition, sought (R., Vol. IV, 893), to sustain Section 11(b)(2) as applied to American here on the basis of Section 32 of the Act—the so-called separability provision, which provides:

> "Sec. 32. If any provision of this title or the application of such provision to any person or circumstances shall be held invalid, the remainder of the title and the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

If any help is derived from this section, it can only be to limit the application of the Act to situations affecting interstate commerce and require jurisdictional findings regarding the effect on commerce by the administrative agency, the S. E. C. Of course, there are no jurisdictional findings here, and the S. E. C. has never construed Section 11 as being limited to situations affecting commerce so as to require such findings.

However, such a separability clause will not sustain a statute as an exercise of the commerce power in the absence

from the statute of other substantive provisions indicating that the statute is intended to be limited to situations affecting interstate commerce. In *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 (1937), this Court upheld the National Labor Relations Act, containing a similar separability clause, as an exercise of the Federal power over interstate commerce, on the sole ground that, by reason of other substantive provisions, that Act could be construed as limited in its application to situations "affecting commerce", and because the findings of the administrative agency in that case, that the situation did affect commerce, were supported by substantial evidence. This Court said in effect that, irrespective of the separability clause, had it been unable to determine that the Act was limited in its application to situations "affecting commerce", it would have declared the Act unconstitutional, 301 U. S. 1, pages 29-32.

As support for the argument based on the separability clause, and in the absence of any finding by the S.E.C. that the alleged "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" in this case, or the dissolution of American, had, or would have, an effect on interstate commerce, beneficial or otherwise, the Court below (R., Vol. IV, 893) cited *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), as if that decision of this Court could be taken as such a finding or an adjudication to that effect.

There was, of course, no issue in that case under Section 11(b)(2). As previously stated, this Court expressly separated the registration provisions there involved (Sections 4 and 5) from the other provisions of the Act and did not pass on the other provisions. Furthermore, far from holding that any "unfair or inequitable distribution of

voting power" or "undue or unnecessary complication of structure" in the Bond and Share System (which by statutory definition includes the American System) had any effect on interstate commerce, or that the dissolution of American would have any effect on interstate commerce, the Court simply held that some of its subsidiaries engaged in transactions in interstate commerce and that made American the proper subject of registration for the purpose of securing data for Congress for future legislation. This is a far cry from a finding by the S. E. C., as a basis for its dissolution order in this Section 11(b)(2) proceeding, that there is any "undue or inequitable distribution of voting power" or "undue or unnecessary complication of structure" in the Bond and Share System affecting interstate commerce or that the dissolution of American will affect interstate commerce, beneficially or otherwise.

It must be concluded that Section 11(b)(2) is not limited or related in any way to situations affecting interstate commerce and is not an exercise of the Federal power over interstate commerce.

III. The drastic grant of power, without standards, contained in Section 11(b)(2) violates the due process clause and is an unconstitutional delegation of legislative power.

We submit that Section 11(b)(2) is an unconstitutional delegation of power to an administrative commission because of the absence of any standards or criteria for guidance.

The only guides we have here for the administrative action which destroyed American and took its property and

the property of its security holders are two phrases contained in the first sentence of Section 11(b)(2)*.

The two phrases are: "unfair or inequitable distribution of voting power", and "undue or unnecessary complication of structure" in holding company systems.

These phrases in the context in which they are used do not themselves constitute any guide. In this context they also carry no historical definition. There are no guides for administrative action in relation to these phrases in Section 1 of the Act, as appears from an analysis of that Section contained in the preceding Point II. Nor does the Section or the Act contain any guide as to whose property is to be taken or destroyed by the administrative body to change the feature or features in a structure which it may choose to deem not to comply with the controlling phrases.

The discussion of the two controlling phrases in subdivisions (1) and (2) and of the decisions of this Court in subdivision (3) below proceeds from the standpoint primarily of the possibilities of oppression inhering in a grant of drastic, undefined power and of the due process clause rather than of what is historically a legislative function. We believe that has been the approach of this Court in condemning or upholding grants of power to administrative agencies.

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* The first sentence reads: "It shall be the duty of the Commission, as soon as practicable after January 1, 1938 * * *:

> "(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system."

The "great grandfather" clause, consisting of the second sentence, which does contain a specification, i. e., that four-layer holding company systems shall not be allowed to exist, is not involved in this case.

Here there is too vague and oppressive a grant of power to come within the limits heretofore present in Acts sustained by this Court.

(1) Brief consideration will demonstrate that the phrase "not unfairly or inequitably distribute voting power" is itself not a standard in the context in which it is used here.

This double negative is the equivalent of a requirement to "fairly and equitably distribute voting power". The phrase "fair and equitable" has a well defined meaning in connection with plans of reorganization in equity and under the Bankruptcy Act, and furnishes a test as to the end result to be achieved under a plan of reorganization when a change of legal rights is caused by some other motivation.* But the phrase does not have any meaning in the context in which it is used here, that is, as a basis for directing a change in legal rights.

To illustrate, if, because of insolvency under the Bankruptcy Act or of the prohibition against continuing a four-layer holding company system contained in the great grandfather clause of this Act, a corporation must be reorganized and the bondholders, preferred stockholders and common stockholders have to take some other or new securities, then the phrase "fair and equitable" is a test of the resulting allocation of the other or new securities, in that it requires that the new securities be the substantial

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* *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939), where this Court, per Mr. Justice Douglas, said (p. 115):

> "The words 'fair and equitable' as used in §77B(f) are words of art which prior to the advent of §77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations."

equivalent of their old securities, and that the relative rights and priorities of security holders be preserved.*

Since the phrase "fair and equitable" relates, in its defined meaning in reorganizations, to preserving the substantial equivalent of existing rights, standing alone it can form no basis for directing a change in those rights.

The plain distinction here is pointed up by the provisions of Section 11 itself. In subdivision (d) and subdivision (e) there are provisions that reorganization plans must be, in the terms of the subdivisions, "fair and equitable." Here is a test of the propriety of the end result of a reorganization plan which changes existing rights, requiring that the change preserve existing rights as nearly as may be. The equivalent of that phrase in subdivision (b)(2) cannot at the same time form the basis for directing a reorganization plan, i.e., for changing existing rights.

A situation under Section 11(e) recently before this Court in *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624 (1945), is a perfect example. There, this Court was considering the sole question whether the test "fair and equitable" set forth in subdivision (e) of Section 11 was met by the terms of a reorganization caused, not by the phrases in the first sentence of Section 11(b)(2), but by the specific direction of the "great grandfather" clause that there shall be no four-layer holding company systems. Because of the prohibition of the "great grandfather" clause there had to be a change in existing legal

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* *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, 634, 639-640, 647-648 (1945); *Group of Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.,* 318 U. S. 523, 565 (1943); *Consolidated Rock Products Co.* v. *Dubois,* 312 U. S. 510, 529, 530 (1941); *Ecker* v. *Western Pacific Railroad Corporation,* 318 U. S. 448, 482 (1943); and *Kansas City Railway Co.* v. *Central Union Trust Co.,* 271 U. S. 445, 455 (1926).

rights, and the result had to be "fair and equitable" in the sense of preserving, so far as possible, in the new legal rights the relative rights and priorities of two existing classes of stockholders.* Obviously, the words "fair and equitable" could not have furnished a basis for an intelligible direction for changing the existing legal rights. That direction had to come from another source. The phrase "fair and equitable" simply required that the change preserve as nearly as might be the preexisting rights.

Nor can it reasonably be contended that there is in the Act, apart from Section 11, a basis or direction which gives meaning to this purported directing phrase of Section 11(b)(2). There is no use of the phrase "unfair or inequitable distribution of voting power" in Section 1 of the Act, and the S. E. C. has conceded that Section 1(c) does not operate as a condition on action by the S. E. C. under Section 11(b), all as pointed out in Point II above.

As will more fully appear from the next ensuing Point IV(a), the S. E. C. itself does not state what is meant by "unfair or inequitable distribution of voting power" in the statute, it has not developed or announced any standard of its own as to what the phrase means, and it does not find specifically what is "unfair or inequitable distribution of voting power" in this case. How then can the S. E. C. contend that the statute contains such a standard?

That the delegation of power in the present Act is oppressive in its effect and cannot be sustained under the principles laid down by this Court is even more forcibly demonstrated in connection with the absence from the statute of any guide for the S. E. C. to determine whose

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* This Court there held that a proposed distribution of new securities between the holders of existing common and preferred stocks on the basis of going concern value instead of liquidating value was fair and equitable. No constitutional question of any sort was raised.

proprietary rights are to be destroyed to correct what the S. E. C. determines to be "unfair or inequitable distribution of voting power".

Let us assume that under Section 11(b)(2) the S. E. C. had determined that the preferred stockholders of American should have a specified greater voting power in American (and that is one of the factors hinted at by the S. E. C. (R., Vol. II, 568) as a possible basis of existing "unfair or inequitable distribution of voting power"), then, so far as the provisions of the statute are concerned, the S. E. C. had the free selection of the action to be taken. It might have directed that the preferred stock be given more votes or that the preferred stock be paid off, or (under the S. E. C.'s construction*) that American be dissolved.

Similarly, if the S. E. C. had determined that there was "unfair or inequitable distribution of voting power" by reason of Bond and Share exercising too great a voting power, as against public stockholders, again under the terms of the statute the S. E. C. had the free choice of action to be taken. It might have ordered the votes accorded Bond and Share to be reduced; it might have ordered Bond and Share not to vote its stock; it might have ordered Bond and Share's stock to be trusteed with individuals selected by the S. E. C.; it might have ordered Bond and Share to divest itself of the stock in American; or (under the S. E. C.'s construction) it might have ordered Bond and Share to be dissolved or American to be dissolved.

Under both of these examples, whose property is to be taken depends upon the whim of the S. E. C. There is nothing in the statute to guide the S. E. C. as to whose property rights are to be taken. As construed by the

*Our position is that Congress did not give the S. E. C. any power to dissolve a corporation under Section 11(b)(2) (Point IV (f)).

S. E. C., there is no requirement in the Act that the remedy chosen by the S. E. C. shall be the one naturally and logically flowing from what is found to be "unfair or inequitable distribution of voting power", for the S. E. C. has not selected such a remedy here.

As previously indicated, the S. E. C. has hinted that because of arrearages in dividends the preferred stock should have more voting power. The only logical and reasonable remedy would seem to be to order the preferred stock given more voting power, while the arrearages continue. But instead, the S. E. C. has ordered the preferred stock destroyed and all of American destroyed.

Thus, the S. E. C. has selected from the many available choices the remedy of destroying American. There is certainly no guide to be found in the Act leading from excessive voting power in *Boud and Share* to dissolution of American.

(2) The other of the two controlling phrases in the first sentence of Section 11(b)(2) is "undue or unnecessary complication of structure."

This phrase taken alone also is not a standard, in that it presents no objective meaning as a basis for action. Taking first the words "complication of structure" alone, they present no objective image. The appeal is only to the subjective. It is something in a structure which a particular individual, depending on what his mental calibre and views may happen to be, would regard as complicated.

"Complication of structure" is not only subjective, but it is comparative. Anything beyond the figure "1" is complicated to some minds. Almost unlimited combinations of factors do not appear complicated to other minds. Thus, "complication of structure" is a comparative subjective conception, and adding to it other subjective comparatives,

such as "undue" or "unnecessary", results in no advance in objective thought.

The phrase does no more than to leave it to the minds of whoever may be the current members of the S. E. C. to determine upon holding company structures according to their current wish.

The words do not carry any connotation known to the law or to the public utility industry, nor is there any indication of the standpoint from which "undue or unnecessary complication" is to be judged. Is it a legal standpoint or an economic standpoint? If the latter, is it the standpoint of the general public, the consumers or the security holders?

From the legal standpoint the phrase is meaningless, in that it forms no basis for making changes to give security holders their legal rights. Everyone in the situation already has his legal rights.

From the economic standpoint, Congress has not said whose interest is to predominate, but has delegated that power to the S. E. C.

Congress has not specified that one-layer or two-layer or three-layer systems are "undue or unnecessary complications"; Congress has only prohibited four-layer systems through the great grandfather clause.

As in the case of the other controlling phrase, the S. E. C. does not point out wherein the statute defines "undue or unnecessary complication of structure." The S. E. C. is obviously uncertain as to what it deems to be an "undue or unnecessary complication".

In parts of its Findings and Opinion (*e.g.*, R., Vol. II, 625-627), the S. E. C. speaks as if it thinks it would have been better if historically the system had been erected as a two-layer system or a one-layer system, or would have been better without some of the classes of securities utilized,

as if some of these features might be "undue or unnecessary complications", without specifying which.

There is also mention (R., Vol. II, 625) by the S. E. C. of "pyramiding" and "leverage", as if there were some feature of the system which came within such terms, although not used in the Act, and might constitute an "undue or unnecessary complication."

At other places (R., Vol. II, 568, 626-627, 630-634) the S. E. C. refers to arrearages in dividends on the preferred stock of American, as if these might be an "undue or unnecessary complication of structure". Financial condition is not part of structure and cannot be complication of structure. Structure is not complicated, or more or less complicated, depending on the assets underlying it, or the value thereof, or the earnings of such assets. Certainly the term "complication of structure" is not an apt one for Congress to use, if it intended thereby to authorize the S. E. C. to revamp structures so that each class of securities in each company therein should, for example, have specified coverages as to assets or as to earnings shown by historical earnings records or by estimates of future earnings. Or if Congress intended that operating companies should have only certain types of securities outstanding, and holding companies should have only certain types of securities outstanding, in each case with certain security or lack of security, Congress could have so specified. Language relating to standards of these types is used by Congress in other sections of this Act, for example, Section 7 of the Act, relating to the sale of securities, and in Section 77 and Chapter X of the Bankruptcy Act.

The truth is that the phrase "undue or unnecessary complication of structure" leaves it wide open to the S. E. C. to dictate the set-up of all companies in the public utility field, without even a hint of what is intended by an "undue

or unnecessary complication," or any indication as to the nature of the factors in the structure of a holding company system on which the S. E. C. should operate.

Thus, the S. E. C. may from time to time form new judgments as to the ideal structure of a particular holding company system, or a company therein, and decide that types of structures not theretofore criticized involve "undue or unnecessary complication of structure" or "unfair or inequitable distribution of voting power." Fashions as to structures have changed radically in the last two or three decades. With this wide open delegation, each time the S. E C. determines that a new fashion ought to prevail, it can start a proceeding to compel dissolution of a company which, under the prior fashion, had a structure deemed entirely proper by the S. E. C., or even against a company which the S. E. C. had theretofore changed to conform to an earlier alleged fashion.*

Under the S. E. C.'s construction of Section 11(b)(2) there can logically be no limitation that once the S. E. C. has required a change, the new changed structure is final. Thus, if the S. E. C. is correct that a preferred dividend arrearage** is an "undue or unnecessary complication", such an arrearage could occur in a corporation after the S. E. C. had already changed its structure once or any number of times.

Here, as in the case of the other controlling phrase, there is no assistance rendered by other provisions of the Act, such as Section 1. There is not a line in Section 1 stating what is "undue or unnecessary complication of structure."

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* As will be shown in Point IV(a) and (c), the S. E. C. has not even pointed to any current fashion as a test in this case.

** Dividend arrearages are not a basis for compulsory reorganization even under a bankruptcy reorganization statute. *In re Piccadilly Realty Co.*, 78 F. 2d 257 (C. C. A. 7, 1935).

Going now to the choice by the S. E. C. of the action to be taken to remedy something that the S. E. C. has determined to be an "undue or unnecessary complication of structure", there is no guide whatsoever as to whose property is to be taken. Suppose that the S. E. C. determines that a three strata system is an "undue or unnecessary complication of structure" and that there should be only two strata. It has a number of choices of action to be taken without any guidance from the statute, each with a different effect on the property rights of different groups of investors. The S. E. C., (according to its construction of the statute) might order the top company dissolved; it might order the top company to divest itself of its holdings in the middle company; it might order the middle company to dissolve (according to its construction of the statute); or it might order a merger of two of the strata into one stratum. Certainly this vast power to change the property rights of one group of investors or another is a matter which should be guided by Congressional enactment.

(3) The Court below herein made no contribution to the reasoning in support of Section 11(b)(2) as not being an unconstitutional delegation.* Examination will show that in none of the cases adverted to by the Circuit Courts of Appeals in this case or the *Commonwealth & Southern* case (the only cases dealing with this point regarding Section 11(b)(2)), has this Court upheld a grant of power as oppressive as that contained in Section 11(b)(2). Nor

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* It said only that since the decision of this Court in the *Schechter* case "counsel have hopefully advanced the delegation argument in many cases, without much success", citing cases to be now discussed (R., Vol. IV, 899). This is as much as to say that this Court no longer will invalidate a statute on account of improper delegation. This certainly constitutes an unwarranted assumption on the part of the Court below. Nor did the Circuit Court of Appeals in the *Commonwealth & Southern* case, 134 F. 2d 747, 752 (C. C. A. 3, 1943), make any contribution. It simply stated in one sentence that there was no unconstitutional delegation, citing some of the same cases.

has this Court upheld a grant such as this in decisions rendered subsequent to those decisions of the Circuit Courts of Appeals. The grant involved here is even more oppressive than the grants of power which have been condemned by this Court in recent years.

This Court has sustained a grant to an administrator of power to fix prices of goods and rents and minimum wages where the statute has related the prices or rents to be fixed to prices or rents existing in base periods, with specified factors for adjustments, or has specified the factors to be taken into consideration in fixing the price or wage, thus leaving to the administrator what amounts to a fact-finding duty.* There is no such guiding reference here.

A grant of power to fix quotas of goods to be introduced into commerce has also been sustained where the quota is related by the statute to a definite test period with specified factors of adjustment.** There also the administrator has a mere fact-finding duty, which could be performed by a judge or jury. There is no such criterion here.

There has also been sustained the grant to an administrator of power to set up labeling classifications for foods to conform to the standards to be found in practices of the food industry, with which classifications the industry

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* *Yakus* v. *United States*, 321 U. S. 414 (1944), (Emergency Price Control Act)—maximum prices of meat under the war power.

Bowles v. *Willingham*, 321 U. S. 503 (1944), (Emergency Price Control Act)—maximum rents in defense areas under the war power.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 (1940), (Bituminous Coal Act of 1937)—maximum and minimum prices for coal.

Opp Cotton Mills v. *Administrator*, 312 U. S. 126 (1941), (Fair Labor Standards Act)—minimum wages.

United States v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939), (Agricultural Marketing Agreement Act of 1937)—prices of milk.

** *Mulford* v. *Smith*, 307 U. S. 38 (1939) (Agricultural Adjustment Act of 1938)—tobacco quotas.

must thereafter conform.* Here was no more than a fact-finding duty involved in setting up the labeling classifications. There is no such direction in this Act to set up a system of classification, or a set of standards, of general application in advance of enforcement action by the administrative agency.

A grant to an administrative body of the power to disapprove acquisition of control of transportation facilities when not in the public interest has been sustained by this Court, on the ground that the term "public interest" carries with it historically defined concepts.** The foregoing discussion in this Point III shows that there is no such historically defined concept carried by the controlling phrases in Section 11(b)(2).

Similarly, the power to set up a general licensing system with respect to broadcasting, governed again by this historically defined standard of the "public interest," has been upheld on that basis and under the authority of the transportation case just referred to.*** Contrasted with that situation, here there is no historical definition carried by the statute, and certainly there is no provision for setting up a generally applicable system of standards in advance of enforcement action by the administrative agency. Instead we have a grant of power to dictate in each individual case without reference to any general system of standards set up either by Congress or by the administrative agency.

It will be observed that in all these cases, relied on by the two Circuit Courts of Appeals or subsequently decided by

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* *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218 (1943), (Pure Food and Drug Act)—Farina.

** *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 25 (1932), (Transportation Act of 1920). (Control by N. Y. Central of Big Four in public interest).

*** *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), (Federal Communications Act), relying expressly, at p. 225, on *New York Central Securities Corporation* v. *United States*, 287 U. S. 12, 25 (1932) *supra*.

this Court, there were either (a) definite standards specified in the statutes, or (b) the standard given in general terms, such as the "public interest", was held to be one which had been historically defined.*

It should be pointed out that the statutes in the cases just discussed had another common characteristic not present in Section 11(b)(2). The result on the offender or the action to be taken by the administrative body was clear from the statute, that is, penalties for non-compliance with the prescriptions of the administrative body were specified, or violators were barred from commerce, or those determined to have failed to qualify were not to be granted licenses or approvals.

On the opposite side of the line must be placed the statutes condemned by this Court in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935), ** and in *Small Company* v. *American Sugar Refining Co.,* 267 U. S. 233 (1925).

In the *Schechter* case, this Court held invalid, as in violation of the due process clause, Section 3 of the National Industrial Recovery Act, authorizing the President to approve "codes of fair competition" for various industries, with which members of such industries were to comply. The term "fair competition" was held not to carry any historical definition. It was not used in the sense of eliminating business practices generally accepted to be "un-

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* The Court below herein also cited (R., Vol. IV, 899) *Hirabayashi* v. *United States,* 320 U. S. 81 (1943), which does not bear on the point under discussion. There Congress had specifically approved, by subsequent legislation, a military curfew on citizens of Japanese ancestry in military areas, prescribed by a military commander under the war power, and conviction for violation of the curfew subsequent to such Congressional action was upheld. The real point at issue was the alleged improper discrimination against citizens by reason of ancestry.

** Expressly reaffirmed by the majority of this Court in *Yakus* v. *United States,* 321 U. S. 414, 424 (1944), although Mr. Justice Roberts, who was in the minority, considered the *Schechter* case overruled by the majority (p. 451).

fair competition" as in the Federal Trade Commission Act. The term was used for the purpose of putting into effect whatever might be deemed at the moment to be helpful to an industry. Mr. Justice Cardozo said in his concurring opinion, on this point (pp. 552-3):

> "By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptation as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot."

In the *Small* case, the Lever Act was held invalid as a violation of the due process clause, because it required conformity to no specified historically defined standard. The statute prohibited "unjust or unreasonable" charges and "excessive prices for any necessaries".*

From the discussion in the preceding subdivisions (1) and (2) of this Point III, it is apparent that the controlling

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* The Court of Appeals, in *Engineers Public Service Company* v. *Securities and Exchange Commission*, 138 F. 2d 936 (C. of A., D. C., 1943), indicated (p. 951) that if under the proviso of Section 11(b)(1) the choice of a system to be retained by a holding company were left to the S. E. C., there would be serious doubts of constitutionality because of the absence of standards for the guidance of the S. E. C. This difficulty compelled the Court to construe the proviso as leaving the choice to the holding company. Correspondingly, Section 11(b)(2) is unconstitutional in leaving the choice of action to be taken to the S. E. C. without any standards for its guidance.

phrases in Section 11(b)(2)—"unfair or inequitable distribution of voting power" and "undue or unnecessary complication of structure", also carry no historical definition and are just as vague and undefined as the phrases involved in the *Schechter* and *Small* cases. The phrase "unfair or inequitable" distribution of voting power, as used in the context here (and not as in subdivisions (d) and (e) of Section 11), is analogous to the term "fair competition", as used in its context in the statute involved in the *Schechter* case. The phrase "undue or unnecessary" complication here is analogous to the phrase "unjust or unreasonable" charges as used in the statute involved in the *Small* case. These grants of power here are not comprised in a statutory administrative program such as led to the upholding of the grants of power in the other cases just discussed. On that basis alone, Section 11(b)(2) should be held invalid.

What we emphasize, however, is that the statutory administrative scheme comprised in Section 11(b)(2), taken as a whole, is even more oppressive than the statutory schemes involved in the *Schechter* and *Small* cases. At least in those cases the result of transgression on the transgressor was clear, and it was not left, as here, to the whim of the administrative agency to determine whose property is to be taken or destroyed and to what extent, in order to remedy what the agency may determine to be a transgression.

IV. The order of dissolution violates the due process clause, is not authorized by Section 11(b)(2), and is not supported by substantial evidence.

Apart from the lack of constitutional basis for the statute already discussed, the order itself and the proceedings before the S. E. C. were invalid for several reasons. These

are: (a) No standards have been developed or announced by the S. E. C. on the basis of which there is any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" which would be remedied by the dissolution of American; (b) To the extent that the order rests on statements in the Findings and Opinion regarding past lawful acts, Section 11 (b)(2) is an unconstitutional *ex post facto* law; (c) Purported findings relied on by the S. E. C. to support its order are fundamentally defective on their face; (d) The order rests on statements in the Findings and Opinion regarding values, yet American was denied a hearing on this issue; (e) The S. E. C. arbitrarily refused to hold hearings on American's voluntary Plan for reorganization; (f) Section 11(b)(2) cannot be construed as authorizing the S. E. C. to dissolve any corporation; and (g) Dissolution of *American* is an unreasonable, arbitrary and oppressive means of remedying alleged defects in the *Bond and Share* System.

(a) No standards have been developed or announced by the S. E. C. on the basis of which there is any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" which would be remedied by the dissolution of American.

It has already been shown in Point III that Section 11(b)(2) presents no standard for action by the S. E. C. If Congress may thus leave to an administrative agency the power to develop or fix standards,* then the action of the S. E. C. in this case is still unconstitutional as a violation of the due process clause. This is because the S. E. C. itself has not developed or announced any standard for determining that there is here any "unfair or inequitable

* Cf. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 92-93 (1943).

distribution of voting power'' or ''undue or unnecessary complication of structure'' which would be remedied by the dissolution of American.

One would expect to find in the Findings and Opinion of the S. E. C. a basic statement of what the S. E. C. determines to be violative of the supposedly activating phrases of Section 11(b)(2) under which the S. E. C. purports to act. Instead we find mere reiteration of the two statutory phrases with the statement that what is condemned by the statute is present in the Bond and Share System, all without specification of any standard that is violated. The S. E. C. does mention (1) computations regarding the percentage interests of various groups of security holders as compared with their voting power, (2) arrears in dividends on American's preferred stock, (3) the three-layer structure of the Bond and Share System as related to American and the latter's subsidiaries, (4) American's alleged lack of economic function, (5) so-called ''pyramiding'' and ''leverage'', and (6) the two senior classes of securities of American.

Brief analysis shows that nothing mentioned by the S. E. C. violates any standard which has been established by the S. E. C. or could properly be established by the S. E. C. as a basis for action by it.

(1) The Findings and Opinion contain computations, not treated by the S. E. C. as conclusive, apparently designed to show that percentage of voting power does not correspond to percentage of financial interest vested in various classes of security holders (R., Vol. II, 619-622, 665). Included in these computations are *bonds* of subsidiaries and *debentures* issued by American and held by the public. It is wholly fallacious, in computing the percentage interests in the companies of stockholders having voting power to include in the computation the amount of bonds and de-

bentures, so as to arrive at a diluted percentage interest. By doing so, the S. E. C. implies that an "unfair or inequitable distribution of voting power" may result from the fact that the bondholders and debenture holders do not have any voting power. But under any standard set up by the S. E. C. it is not "unfair or inequitable" for bondholders or debenture holders not to have voting power. The S. E. C. approves the issuance of unsecured bonds of holding companies which do not carry a vote. *E.g., In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942; and No. 3794, September 19, 1942). Certainly there are no standards outside the decisions of the S. E. C. suggesting that bondholders or debenture holders should have a vote. It is common knowledge that it is an unusual feature, permitted by the statutes of only a few states, to give bondholders a vote along with stockholders for the election of directors or on other corporate matters not specifically affecting such bonds.

The Findings and Opinion mention the voting power in American of its public stockholders and of Bond and Share, stating that Bond and Share has 20.7% of such power, so that the public has 79.3% of such power (R., Vol. II, 617). It is also mentioned that Bond and Share's financial interest is very small as compared with that of the public (R., Vol. II, 621). At the same time it appears that the public has cast in the last six years (1935-1941) 63% of all votes cast and Bond and Share only 37% (R., Vol. II, 617). The public has therefore had, and has exercised, the dominant voting power. It is certainly not in accordance with any possible standard for the S. E. C. to dissolve American because, according to the S. E. C., Bond and Share should have had 4½% voting power (corresponding to its percentage interest of the book value of American's stocks), instead of 20.7%.

(2) By calling attention to the lack of a charter provision for increasing the voting power of the preferred stock of American while dividends are in arrears (R., Vol. II, 568), the S. E. C. may imply, but without so stating, that voting power is inequitably distributed, while such arrearages exist, between the holders of the preferred stock and the holders of the common stock.

Certainly there is no evidence in the record that the holders of the preferred stock have complained of the lack of a provision increasing their vote. The contrary is indicated. The record shows that in the period subsequent to the passage of the Act, 1935 to 1941, a greater percentage of the public holders of preferred stock have voted than the public holders of common stock, and that they have voted in favor of the present management (S. E. C. Exs. 49 and 49A; R., Vol. I, 201; Tr., 18156).

Moreover, arrearages in dividends on the preferred stock cannot be the "undue or unnecessary complication" found by the S. E. C. here, for that would only require reclassification of the preferred and common stocks as ordered by the S. E. C. in the *Commonwealth & Southern* case.

Clearly there is no possible standard which could call for destroying the voting power of the holders of the preferred stock, along with the voting power of the holders of the common stock, because, according to the S. E. C., the preferred stock has too little voting power.

(3) That Bond and Share, American, and the latter's subsidiaries constitute a three-layer structure cannot *per se* be an "undue or unnecessary complication", for the "great grandfather" clause in the second sentence of Section 11(b)(2) by forbidding only four-layer systems contemplates the continuance of three-layer systems.

While the S. E. C. conceded (R., Vol. II, 625) that the corporate chart of the Bond and Share System (R., Vol. II,

657, Appendix A) appeared relatively simple, consisting of a top holding company on the first level, sub-holding companies on the second, and subsidiaries of the latter on the third, it found that this first impression was wholly delusive because each operating company had a complex structure (generally bonds, preferred stock and common stock) upon which were imposed the holding companies' securities (debentures, preferred stock and common stock), and then the preferred stock and common stock of Bond and Share.

The S. E. C. stated that some of the operating companies also had subsidiaries which had different classes of securities outstanding so that income derived from the "generation and sale of electric energy and gas" did not reach the common stockholders of Bond and Share until it had been "filtered through seven to fourteen classes of securities having prior claims to such earnings" (R., Vol. II, 625, 626).

It may be remarked that the conduit of income allegedly through fourteen classes of securities is hyperbole.* The possible single instance in the American System was where a utility company in developing gas properties had found it desirable to organize certain non-utility companies to develop the production and sale of oil obtained in connection with the production of gas, and the income so derived was not from the sale of electric energy or gas. The seven classes of securities mentioned by the S. E. C. are the typical classes existing in the extreme tier from the bonds of the operating company to the common stock of Bond and Share.

This superimposition of tiers of securities upon each other was said to make it difficult for the investor accu-

* Furthermore, we are unable to find factual support in the record for this statement and believe it to be unfounded.

rately to appraise the income which would accrue to his securities, particularly in the case of Bond and Share (R., Vol. II, 627), and the evil was said to be magnified by the mounting arrearages on the preferred stocks of American (R., Vol. II, 630-634). Thus the system was found to be unduly complicated, and also unnecessarily so on the alleged ground that American did not perform, and had not performed, any necessary functions either for its investors or for its subsidiaries (R., Vol. II, 634).

This whole theory of corporate complexity of the American System is based upon a loose generalization predicated on a particular instance or instances in the Bond and Share System as a whole, and as applied to American dissolves into thin mist on factual analysis.

The mere existence of three tiers of companies in the Bond and Share System did not justify an order for the dissolution of American. If the evil found to exist by the S. E. C. was solely the superimposition of Bond and Share on the corporate and capital structure of the American System, the obvious remedy should have been the elimination of Bond and Share's interest in the American System, which, incidentally, is now proposed by Bond and Share itself in a plan recently filed under Section 11(e) of the Act (Holding Company Act Release No. 5970, August 6, 1945).

If, on the other hand, the evil found to exist by the S. E. C. was the fact that certain utility subsidiaries had underlying subsidiaries, the obvious remedy should have been the "folding in" of those underlying subsidiaries or their sale. That such a remedy would have been feasible is indicated by what has transpired since the date of the S. E. C. order. It appears from Appendix A to the S. E. C. opinion (R., Vol. II, 657) that American had sixteen utility subsidiaries, eleven of which had no subsidiaries, two of which had only one subsidiary and only three of which had

two or more subsidiaries. Through sale or absorption by their respective parents, and in many instances with approval of the S. E. C., most of these subsidiaries of American's utility subsidiaries have disappeared from the American System.* An order providing either of these remedies would have removed from the system one tier of companies and several classes of securities.

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* The five utility subsidiaries which are shown as having subsidiaries in Appendix A and their present position with respect to such subsidiaries are as follows:

Florida Power & Light Company has retained Consumers Water Company and has acquired, with the approval of the S.E.C., Utilities Land Company which was formerly a direct subsidiary of American (Holding Company Act Release No. 4791, December 30, 1943).

Minnesota Power & Light Company owns all the assets once owned by Great Northern Power Company, which continues in existence only as a shell company by reason of an outstanding bond issue. In addition the S. E. C. has authorized and found necessary and appropriate to the enforcement of the Act the acquisition by Minnesota of the stocks of American's former direct subsidiaries, Superior Water, Light and Power Company (which had previously acquired the properties of Northern Power Company, another direct subsidiary of American), Pike Rapids Power Company, and Topeka Land Company (Holding Company Act Release No. 5850, June 7, 1945).

The Montana Power Company caused the dissolution of its subsidiary Glacier Production Company after that company had disposed of all its properties (Holding Company Act Release No. 5463, December 1, 1944), and the three subsidiaries of Glacier Production Company, namely, Inland Empire Refineries, Inc., Chief Petroleum Company, Inc., and Moen-Leick Industries, Inc. were eliminated from the system at the same time. The Montana Power Company also caused the dissolution of its subsidiary Great Falls Townsite Company.

Pacific Power & Light Company has absorbed its subsidiary Inland Power & Light Company (Holding Company Act Release No. 3505, May 5, 1942) and has disposed of its interest in Yakima Credit Company, its only remaining statutory subsidiary being R. S. & C. Irrigation Company, Inc., which operates a small cooperative irrigation project.

The Washington Water Power Company has disposed of its interest in Chelan Valley Credit Corporation, and Spokane United Railways, its other subsidiary, has sold all its properties and is awaiting formal dissolution.

(4) The S. E. C. says (R., Vol. II, 634) that American is unnecessary to its investors and that American does not service the subsidiaries. But American services its own securities, protects the interests of its security holders, and further performs the economic function for its investors of diversifying their investment in the public utility field. This could not be accomplished as a practical matter by the average small investor and is an investment function which has nowhere been condemned but, on the contrary, has been praised by investment authorities. Nor can the S. E. C. point to any line of authority of any sort that it is an essential function of a holding company that it service its subsidiaries. Many of the important holding company systems in the country have no service organization, but the Commission has not suggested their dissolution for that reason.* American is essentially an investment company in the public utility field. Investment companies generally are not condemned by the Federal statutes, but simply regulated under the Investment Company Act. Investment companies do not service or manage the companies whose securities they hold. This fact does not nullify their economic function for the investor.

The S. E. C. also says (R., Vol. II, 634) that American lacks economic function because it entails unnecessary expense. However, there must be offset against such expense the advantages mentioned in the preceding paragraph and the large savings in dividend paying and stock transfer ex-

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* *In the Matter of Federal Water and Gas Corporation* (Holding Company Act Release No. 4113, Feb. 11, 1943); *In the Matter of The North American Company* (Holding Company Act Release No. 3405, April 15, 1942); *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942. In *In the Matter of The Commonwealth & Southern Corporation* (Holding Company Act Release No. 2626, March 19, 1941), the Commission, while permitting continuance of the holding company but restricting the scope of its operations, ordered the service organization to be discontinued.

pense (mentioned in Point I above), and there have been substantial income tax savings due to ability to file consolidated returns for American and its subsidiaries under current laws.*

The S. E. C. says (R., Vol. II, 634) that American entails "serious complications from an investment point of view in respects indicated above". The respects "indicated above" are the allegation that it is difficult for an investor in Bond and Share to calculate the earnings applicable to his securities in Bond and Share. These criticisms cannot be seriously advanced as a standard for dissolution of American and the destruction of its property and that of its public investors.

(5) The S. E. C. refers (R., Vol. II, 625) to "pyramiding" and "leverage" being present. Not only is there no reference to "pyramiding" and "leverage" in the statute, but also the S. E. C. has not developed or announced any standard of what constitutes a degree of "pyramiding" or "leverage" which is improper. "Pyramiding" and "leverage," as such and without definition as to degree, cannot be improper. There is always "pyramiding" if there exists one company owning less than 100% of the securities of another. Correspondingly, there is always "leverage" when there is one class of security senior to another in even one company and the superimposition of a holding company does not *per se* increase the leverage. The S. E. C. in no way indicates, by announcing a standard or other-

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* A computation of income tax savings does not appear in the record, since the current Federal tax laws were enacted after the closing of the record. An approximate computation made under such laws from data in the record makes it appear that there were savings through a consolidated income tax return in at least the amount of $2,000,000 for 1942.

wise, how much "pyramiding" or "leverage" is "undue or unnecessary complication."

(6) Nor can any of the senior classes of securities of American be an "undue or unnecessary complication" under any standard erected or announced by the S. E. C. Unsecured bonds of a holding company, like the debenture bonds of American, have been held by the S. E. C. not to be a violation of Section 11(b).* At any rate there is no need to dissolve American on account of such bonds. The $45,000,000 issue could easily be paid off. Similarly, the preferred stock of a holding company cannot constitute an undue or unnecessary complication, for the S. E. C. held, in the same case just cited in the footnote, that such a preferred stock was not a violation of Section 11(b).

By reason of this lack of a developed or announced standard or even of any basic finding as to wherein there is any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure", the action of the S. E. C. cannot be deemed due process and its order must be considered unconstitutional as violative of the Fifth Amendment. This is so whether the administrative body is required first to develop standards and then apply them (*Chenery* case, *supra*, 318 U. S. at pp. 92-93) or may proceed case by case to fix them (*Chenery* case at p. 99).

(b) To the extent that the order rests on statements in the Findings and Opinion regarding past lawful acts, Section 11(b)(2) is an unconstitutional *ex post facto* law.

If the controlling phrases of Section 11(b)(2), "unfair or inequitable distribution of voting power" and "undue

* e.g., *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942, Release No. 3794, September 19, 1942).

or unnecessary complication of structure", relate to acts committed in the past in building up the structure or in distributing voting power, and property rights are taken on account thereof, then Section 11(b)(2) imposes a penalty for past legal acts and is an *ex post facto* law within the prohibition of Article I, Section 9, of the Constitution.

The Findings and Opinion of the S. E. C. contain numerous statements relating solely to acts performed prior to the passage of the Act which were not illegal when performed but which are now condemned by the S. E. C. (e.g., R., Vol. II, 563-565, 617-618, 619). If these facts are to any extent the basis for determining that there is "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" here, then this application of the Act would be within the prohibition of Article I, Section 9, of the Constitution. In view of the prohibition, it would also be a violation of the due process clause for an order to be based on findings regarding such past legal acts.

A law need not be in form a *criminal law* to violate the prohibition of Article I, Section 9. To be an *ex post facto* law, a law need only impose a penalty, such as the taking of property, for past acts which did not violate any law at the time committed.

Fletcher v. Peck, 6 Cranch, 87 (1810) (annulling title to real property);

Cummings v. The State of Missouri, 4 Wall. 277 (1866) (denial of right to hold office and practice profession);

Ex parte Garland, 4 Wall. 333 (1866) (denial of right to practice profession);

Pierce v. Carskadon, 16 Wall. 234 (1872) (denial of right to defend legal proceeding).*

Take two holding company systems existing today with exactly the same structure, that is, the same number of companies and the same classes of securities in each company. Suppose that the S. E. C. has no objection to the structure in and of itself. But then suppose that the S. E. C. finds that one system was built up by legal means which the S. E. C. now deems improper or unnecessary or unfair

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* In *Fletcher* v. *Peck*, 6 Cranch, 87 (1810), *supra*, the Court said (p. 137):

> "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why then, is it allowable in the form of a law annulling the original grant?"

In *Cummings* v. *The State of Missouri*, 4 Wall. 277 (1866), *supra*, the Court said (pp. 327-328):

> "The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. * * * They are aimed at past acts, and not future acts." * * *
>
> "Now, some of the acts to which the expurgatory oath is directed were not offences at the time they were committed. * * * Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law—'they impose a punishment for an act not punishable at the time it was committed.'"

and the other was built up by legal means which the S. E. C. does not now deem improper or unnecessary or unfair. Clearly, if the S. E. C. were to enter an order against the first system or any company therein under Section 11(b)(2), changing property rights on account of the historical events, this would be an infliction of a penalty for acts which were legal at the time committed and would violate Article I, Section 9, of the Constitution.

It is, therefore, obvious that the S. E. C. must abandon any position that the order issued under Section 11(b)(2) can be sustained by findings of the S. E. C. regarding acts occurring prior to the enactment of the Act.

(c) Purported findings relied on by the S. E. C. to support its order are fundamentally defective on their face.

We have already shown in Point II that the Findings and Opinion contain no jurisdictional findings that there is any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" affecting interstate commerce.

We have shown in subdivision (a) of this Point IV that the S. E. C. has not developed or announced in its Findings or Opinion any standards by which any feature in the Bond and Share System relating to American constitutes "unfair or inequitable distribution of voting power" or "undue or unnecessary complication."

Statements in the Findings and Opinion regarding past legal acts cannot support the order of the S. E. C. (Point IV(b)).

What other findings* are there then, in the Findings and Opinion, and can they support an order of dissolution of American?

The S. E. C. preceded a specific discussion of American with a general discussion of the Bond and Share System,

* Findings on the subject of present values cannot support the order because of denial of a hearing (Point IV(d)).

including not only American and Electric Power & Light Corporation, but also American Gas and Electric Company, National Power & Light Company and American & Foreign Power Company Inc., none of which is presently involved. Aggregating the consolidated capital of these five holding companies, it found that Bond and Share's control resulted from a holding of voting securities representing 1.85% of the total combined consolidated capitalizations of the five subholding company systems (R., Vol. II, 613-618). This is, of course, a perfectly meaningless exercise in abstract mathematics. The problem is of necessity a separate one as to each company.

The S. E. C. continues with a discussion of voting power which is wholly fallacious (R., Vol. II, 613-622).

One fallacy is to proceed on the basis that debt securities and preferred stock should have a vote. Both Bond and Share's and American's holdings in subsidiary capitalization, which consist primarily of voting securities, are compared with total consolidated capitalization, including debt and non-voting preferred stocks, without any reference to position or function of the securities in the system. The aggregate capitalization of the subsidiaries of American as per their books is $729,000,000, of which $361,000,000 is represented by debt securities, leaving $368,000,000 represented by the preferred and common stocks. American owns $254,000,000 of these preferred and common stocks, or approximately 69% of the stock capital (R., Vol. II, 665, Appendix E-2; Consolidating Balance Sheet and supporting schedules, Ex. D to 1941 Form U5S of American; R., Vol. I, 262).

As has already been mentioned in subdivision (a)(1) of this Point IV, it has never been contended by the S. E. C. that debt should have a vote in literally hundreds of financing applications which it has approved. It

is uniformly recognized that 50%, and in many cases, more, of the capital may be represented by non-voting bonds or other debt securities.*

Non-voting preferred stock, to the extent of approximately half the remaining capital, has likewise been recognized in many cases, subject only to the qualification affording limited voting rights in specific cases, and controlling voting rights in case of accumulated arrearages on preferred stocks.**

Arrearages on the preferred stocks of subsidiaries are negligible and at the time of the order existed only in the case of a single subsidiary, Portland Gas & Coke Company (R., Vol. II, 540).

Arrearages in preferred dividends of American afford no grounds for American's dissolution and destruction of its interest in its subsidiaries from which source alone the arrearages may eventually be compensated. If American were to be reorganized by the S. E. C. and new preferred securities issued to compensate for the arrearages, under its uniform practice the S. E. C. would require voting control to be vested in the preferred stock whenever the arrears exceed some specified amount.

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* *In the Matter of Indiana Hydro-Electric Power Company* (Holding Company Act Release No. 5027, May 6, 1944)—long term debt 57.96% and preferred stock 59% of remaining capital; *In the Matter of The California Oregon Power Company* (Holding Company Act Release No. 3728, August 12, 1942)—long term debt 49.6% and preferred stock 45% of remaining capital; *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942)—long term debt 62.3% and preferred stock 59% of the remaining capital. These are merely illustrations of a large number of decisions approving similar ratios.

** See cases cited in preceding footnote, and also: *In the Matter of Atlantic City Electric Company* (Holding Company Act Release No. 3328, Feb. 16, 1942); *In the Matter of Cities Service Company* (Holding Company Act Release No. 3711, August 5, 1942), and *In the Matter of Central Maine Power Company* (Holding Company Act Release No. 3883, Nov. 5, 1942).

Such a remedy was, in fact, unnecessary here since American had filed a plan in this proceeding directed to a reclassification of stock under which the presently outstanding preferred and common stocks would be retired and one class of new common stock issued in lieu thereof. In such proceeding all inequities due to voting control that might be found by the S. E. C. would, of course, be eliminated. For the S. E. C. to require *dissolution* of American based on the absence of controlling voting power in the preferred stock was definitely capricious.

The S. E. C. also proceeded on the basis of tentative figures as to which it abstained from making findings and then made fallacious use of those figures.

The S. E. C. found the total capitalization of American's subsidiaries (including long-term debt and surplus) was $729,143,155 (R., Vol. II, 619). Assuming the integrity of these figures based on book values, the securities of subsidiaries owned by American have a book value of $303,837,930, or approximately 41.67% of the total capital including surplus contributed by all security holders (*Id.*). But the S. E. C. stated the integrity of these book figures was brought in question by evidence of system "write-ups", and "*if the apparent system write-up* in each of these companies, as indicated in the present record, be deducted from the underlying book value of the securities owned by American", it appeared that securities owned by American represented only 21.41% in the capitalization of its subsidiaries (R., Vol. II, 619-620).*

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*It should also be noted that the "write-ups" referred to are not "write-ups" as understood by accountants, namely an upward reappraisal of assets by a company. The staff of the S. E. C. seem to regard as a "write-up" the full difference between the stated value of securities of a company issued as representing the value of properties at the time acquired and the cost of such properties to any other company in the same "system" irrespective of when those properties were acquired, how long they were held, or what had been done to enhance their value while so held.

But the S. E. C. stated that even these figures were based on assumed values of surplus accounts and "*substantial further adjustment may be necessary* because of the probable inadequacy of the reserves for retirements" and that "*if* such inadequacy be measured" by comparison between book accruals and the amounts claimed or allowed for depreciation for Federal income tax purposes, then securities owned by American would represent only 4.75% of the capitalization of the subsidiaries (R., Vol. II, 620).* By this process American's equity in subsidiaries, which cost it over $250,000,000, was reduced to $21,189,046 (R., Vol. II, 665, Appendix E-2, Col. 13).

The S. E. C. further stated that considering this capital structure as part of the structure of the Bond and Share System, its inequity was magnified, for Bond and Share had effective control through a holding representing only 3.42% of the total capitalization of American's subsidiaries before adjustment for write-ups and depreciation (R., Vol. II, 621-622).

The Commission concluded: **"On the basis of the foregoing figures,** it is apparent we must find that voting power

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* It was conceded by the S. E. C. that the result of such comparison was not a "conclusive figure" but merely one which has "frequently been found helpful" (R., Vol. II, 620). That such comparison is unrealistic is obvious from the fact that the S. E. C.'s computations indicate an adjustment for depreciation in the case of the Florida Power & Light Company of $22,165,213 (R., Vol. II, 665, Appendix E-2, Col. 11), whereas, in the proceeding directed to the recapitalization of the Florida Company so as to cause it to comply with the Act, instituted by the S. E. C. under Section 11(b)(2), an adjustment in the depreciation reserve of that Company of only $2,400,000 was required by the S. E. C. (Holding Company Act Release No. 4791, Dec. 30, 1943). In like manner the S. E. C.'s computations indicate an adjustment for depreciation for Texas Electric Service Company and Minnesota Power & Light Company of $7,284,133 and $9,322,873 respectively, a total of $16,607,006, but in subsequent recapitalizations of these companies approved by orders of the S. E. C., the Commission required no such adjustments (Holding Company Act Releases Nos. 5742 and 5850, April 21, 1945, and June 7, 1945).

is unfairly and inequitably distributed among the security holders of the American system, and among the security holders of the American-Bond and Share system: and that accordingly the continued existence and capital structure of American unfairly and inequitably distribute voting power among security holders of the Bond and Share system" (R., Vol. II, 622).

Obviously the first clause of this finding is entirely outside the scope of the issues presented by the notice and order for hearing of May 9, 1940 as limited by the subsequent order of June 7, 1940, confining the issue to the Bond and Share System and not extending to the American System as such. Beyond this the finding is utterly inadequate to afford a basis for an order dissolving American.

Upon its theory that justification of a dissolution order may be found in the ratio between the values of subsidiary securities held directly by American and indirectly by Bond and Share, respectively, to the total values of all subsidiary securities in the system, the S. E. C. had to reach two separate and distinct conclusions: first, that the figures indicating the extent of interest of American in its subsidiaries were such as to justify the finding that voting power is unfairly and inequitably distributed among security holders in the *American System*, and, second, that voting power is unfairly and inequitably distributed among the security holders in the combined *Bond and Share-American System*. With respect to the latter finding, the S. E. C. was content to adopt the book values in the belief, doubtless, that a holding by Bond and Share representing only 3.42% of the total capitalization of American's subsidiaries before adjustments was adequate to support an order for liquidation or dissolution in some form of Bond and Share's interest in American.

But with respect to American, the comparable ratios definitely found by the Commission were the book figures, according to which American owned 41.67% (represented principally by voting securities) of total capital, including surplus. The S. E. C. was apparently (and we think quite justifiably) not satisfied to rest an order of dissolution of American upon such a finding. Therefore it made purely hypothetical adjustments on mathematical formulae for so-called "apparent" write-ups, and possible under depreciation upon which it makes not even an "apparent" finding.

By this purely mechanical process adopted as a hypothesis for the purpose of a result, it reached its percentage of 4.75% of the capitalization of subsidiaries, thereby reducing American's admitted investment of over $250,000,000 to a value of approximately $21,000,000.

But beyond this a false method of computation, even on its own assumptions, was employed by the S. E. C. The percentages were determined for all properties as a group and the system was condemned on an overall basis. Where the computation showed American's investment in a subsidiary to be less than nothing such negative amount was deducted from the amounts which represented a positive investment in other subsidiaries (R., Vol. II, 665, Appendix E-2, Col. 13). Certainly there can be no logical reason for judging the fairness of American's voting control of subsidiaries in which it has a large equity investment on the basis of a claimed deficiency in its equity in some other subsidiary.* In the case of seven of the companies listed

* An analysis of column 13 in Appendix E-2 referred to in the text, shows positive investment in subsidiaries, even after these hypothetical deductions for write-ups and depreciation in those particular companies, of $47,879,054, from which is deducted the sum of $26,690,008, representing the alleged deficiencies in capital accounts if adjusted for so-called apparent write-ups and depreciation in other subsidiaries. The difference between these two figures yields the $21,189,046 used by the S. E. C. to arrive at its result.

American's investment is practically 100% of the total subsidiary capitalization.

There was another fallacy introduced by the S. E. C. in order to produce this 4.75 percent, appearing on the face of the Findings and Opinion. American owns not only common stock in its subsidiaries but also other classes of securities, including bonds which are senior to securities of the subsidiaries outstanding in the hands of the public (R., Vol. II, 659). But after the S. E. C. calculated the hypothetical write-ups and the hypothetical deficiencies in depreciation reserves for a subsidiary, the S. E. C. deducted the whole adjustment from all of the securities of the subsidiaries *owned by American;* that is, in some instances it wiped out the common stock of the subsidiary owned by American and then cut into the face amount of the bonds of the subsidiary owned by American (R., Vol. II, 665). Obviously, this is an improper method of computation, for after wiping out the common stock of the subsidiary owned by American, the calculation could only result in cutting into the value of the preferred stock of that subsidiary in the hands of the public before it would cut into the face amount of the bonds of the subsidiary held by American.*

Purely as illustration of the unreality of the S. E. C.'s approach to the issue before it we cite three instances of recent occurrence. The S. E. C. in its Appendix E-2 (R., Vol. II, 665) arrived at a net deficit in American's equity in the Nebraska Power Company of $2,463,808 after de-

* What the S. E. C. has obviously done, although it nowhere says so in the Findings and Opinion or the schedules attached thereto, is to assume that the bonds of the subsidiary held by American would be subordinated by a court to all other bonds of that subsidiary and to preferred stocks of the subsidiary outstanding in the hands of the public. This is a wholly inadmissible assumption, because no facts justifying any such subordination are even indicated in the Findings and Opinion.

duction for write-ups and depreciation. On December 26, 1944, American sold its common stock in Nebraska Power Company for over $14,000,000 (Holding Company Act Release No. 5517, Dec. 26, 1944), or a total sales value of American's holdings of over $16,000,000 in excess of the minus figure of $2,463,808 used by the S. E. C. in its computation in this case.

In the case of Florida Power & Light Company the S. E. C. (Appendix E-2) arrived at an ultimate deficit in American's holdings in the Florida Company of $609,791, whereas in its order approving the reorganization of the Florida Company it recognized a book equity of American in the Florida Company of $23,615,832 (Commission Order, dated December 28, 1943, Holding Company Act Release No. 4791, December 30, 1943).

In Appendix E-2 the S. E. C. found American's equity in The Montana Power Company to be $8,860,068. Since the order of the S. E. C. in this case, the oil producing and refining properties of Glacier Production Company, a subsidiary of The Montana Power Company, have been sold for over $9,000,000 (Holding Company Act Release No. 5463, December 1, 1944) and by an order dated June 29, 1945, the S. E. C. has recognized the residual value of the common stock and surplus of The Montana Power Company in the amount of $22,614,000 after the elimination of all inflationary items found by the Montana Public Service Commission and the creation of a contingency reserve of $18,000,000 for additional electric plant adjustments found by the Federal Power Commission (in conflict with the Montana Commission) to have been inflationary (Holding Company Act Release No. 5897, June 30, 1945).

Consequently the tabulations which lead to the figure of 4.75% for American's proportion of the total capitaliza-

tion of its subsidiaries are wholly indefensible, and the S. E. C. is thrown back on book values to support its final conclusion as to distribution of voting power. As already shown, that conclusion cannot possibly be supported by book values.

Similarly, in its conclusion regarding "undue and unnecessary complication", the S. E. C. relied primarily on the alleged control Bond and Share is able to exercise, through investments in American and the investments of American in its subsidiaries, which it termed a "pyramiding arrangement" (R., Vol. II, 634). Consequently, these same fallacious value computations were also used by the S. E. C. in arriving at its conclusion with respect to complication of structure.

The Court below failed to grasp the contention of American that the S. E. C. erred in adjusting dollar figures representing values without having any basis for, or making, any true valuation to support the resultant figures. The S. E. C. acted in this proceeding in reliance on dollar figures which were without foundation.

Eliminating then these alleged findings as fundamentally defective (along with the statements of past legal acts), there is left in the Findings and Opinion only a statement of the bare present set-up of American and its subsidiaries in the Bond and Share System, set forth in the introduction to this brief. Such facts cannot form a legal basis for the dissolution of American under the due process clause.

(d) The order rests on statements in the Findings and Opinion regarding values and violates the due process clause, since American was denied a hearing on this issue.

As seen above, the S. E. C. based its findings primarily upon book values which it at the same time rejected as subject to possible adjustments for apparent write-ups and

inconclusive depreciation computations and fortified its conclusion by these adjustments. By this process it reduced American's investment in subsidiaries having a ledger value on the subsidiaries' books of $303,000,000 and an investment on American's books of $250,000,000 to a hypothetical value on account of the assumptions made of approximately $21,000,000 (R., Vol. II, 540, 619, 665, Appendix E-2).

To meet the issues presented by the exhibits resulting in this finding, American made an extensive and detailed offer of proof of the present value of the properties of its subsidiaries, and of the actual depreciation suffered by those properties, and of their earning value (R., Vol. I, 234-262). The substance of this offer was that the total reproduction values, less depreciation, of the subsidiary properties of American, aggregated $741,854,644 (R., Vol. I, 248), and that the portion thereof applicable to the securities owned by American was $315,502,363 (R., Vol. I, 253).* This value plus cash and current assets applied to American's capital structure would satisfy the long-term debt of $45,849,000, preferred stock of $177,145,326, arrearages thereon of $35,114,788, and leave a remainder for common stock of $76,349,806 (R., Vol. I, 253). The available income to American for the years 1937 through 1941, giving effect to the conditions prevailing in December, 1941, but based on Federal income tax rates for 1938 and 1939, would have aggregated $75,026,511, which after all prior charges would

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* The valuations offered by American were conservative. For example, the valuation for the common stock of Nebraska Power Company offered was $11,527,540 (R., Vol. I, 251), whereas such stock has recently been sold for over $14,000,000 (Holding Company Act Release No. 5517, Dec. 26, 1944); and American offered proof of a value for its holdings in Florida Power & Light Company of $22,887,390 (R., Vol. I, 251), whereas the S.E.C. has recognized the book equity of American in that company at $23,615,832 (Holding Company Act Release No. 4791, Dec. 30, 1943).

leave available for common stock for those years a total of $9,873,361 (R., Vol. I, 257-258).

This testimony was rejected by the examiner and his action was sustained by the S. E. C. (R., Vol. II, 532).

There is not here involved any question of rate base valuation or original cost accounting, but solely a question of the fair value of securities. Such values are not predicated on an audit of capital accounts but on a fair appraisal of "enterprise value", giving full consideration to all elements of value, with particular emphasis on the earnings available to satisfy all classes of securities.* It would appear that this testimony was highly relevant to the issues as framed and disposed of by the S. E. C. itself.

American was thus denied a hearing and the opportunity to introduce evidence on one of the main points in the existing situation. It has been uniformly held by this Court that the refusal of a hearing on evidence which is relevant and material to a matter in issue is a violation of the due process clause of the Fifth Amendment or of the Fourteenth Amendment.

Chicago Junction Case, 264 U. S. 258 (1924);
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38 (1936);
Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U. S. 292 (1937);
Morgan v. *United States*, 304 U. S. 1 (1938);
National Labor Relations Board v. *Indiana & Michigan Electric Co.*, 318 U. S. 9 (1943).

* The S.E.C. itself has consistently recognized this principle in its allocation of security values in reorganization proceedings. *In the Matter of Jacksonville Gas Company* (Holding Company Act Release No. 3570, May 28, 1942, at p. 11); *In the Matter of The Middle West Corporation* (Holding Company Act Release No. 3580, June 5, 1942, at p. 30); *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942, at p. 30).

In *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9 (1943), *supra*, the Court (Mr. Justice Jackson) said (p. 28):

> "But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

The Court below dealt cavalierly with this point of denial of a fair hearing through exclusion of the petitioner's valuation evidence. Its unique statement in this regard was (R., Vol. IV, 888):

> "We think we should indulge the presumption that the Commission and its lawyers would know enough not to commit the egregious blunder of (1) making a ruling that petitioners could not be allowed to introduce valuation evidence, and (2) in the same document making ultimate findings predicated in part upon subsidiary findings as to valuation. This consideration would weigh with us in resolving any possible ambiguities that might exist in the Commission's findings."

The Court then said (*Id.*) that it did not believe that the Commission's findings rested on subsidiary findings as to present valuation, and also cited the *Commonwealth &*

Southern case, sustaining the exclusion of valuation evidence as irrelevant in that case.*

But, if the order is not based on any statements in the Findings and Opinion relating to valuation, there is nothing left to support the order of dissolution.

Moreover, for example, it would be impossible to reach a conclusion that there was unfair distribution of voting power in the subsidiaries of American as between American and the public holders on the basis of the book figures because the book figures show that American has a 69% interest in the stocks of its subsidiaries, primarily in common stock. Any such conclusion, based upon percentage interest of American, could only be supported by a revaluation, and no such revaluation could properly be made without receiving and considering American's evidence on that issue.

(e) The S. E. C. arbitrarily refused to hold hearings on American's voluntary Plan for reorganization.

As an alternative to the S. E. C.'s proposal of dissolution, American, on July 23, 1941 (over a year prior to the closing of the record), filed a Plan of reorganization which purported to comply with the provisions of the Act with respect to the confinement of operations to a single integrated public utility system, or systems, and to retire its

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* *Commonwealth & Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747, 754 (C. C. A. 3, 1943) involved an order of the S. E. C. only requiring that preferred and common stock be reclassified into one class of stock without stating the division of the new stock between the two existing classes. The Court said that valuation evidence was not needed until it was time to determine such division and that it was obvious on the face of things that some reclassification as ordered was desirable. We think that the decision was erroneous and that valuation evidence should have been admitted. In any event, the case is clearly distinguishable from the present one where the whole decision of the Commission obviously turns on the relative values of the interests of various groups of security holders.

debt, and reclassify its preferred and common stock into single class of common stock, and filed therewith an applica tion for its approval. This application and the Plan are se forth in full in the record (R., Vol. II, 393-471).

On December 6, 1941, American filed a motion to con solidate its application for approval of its Plan with th pending proceedings before the S. E. C. under Sectio 11(b)(2) of the Act (R., Vol. I, 386-392). The motion t consolidate was deferred, and reserved for final ruling o the S. E. C. (R., Vol. I, 292, 295).

The S. E. C. in its Opinion denied the motion to consoli- date and refused to grant hearings on the Plan in advance of its order of dissolution (R., Vol. II, 533).

The Plan proposed that American would provide for the payment of its debentures and reclassify its stock capital, preferred, including arrearages, and common, into a single class of common capital stock, according to each present class of stock such proportion of the new common stock as should be fair and equitable (R., Vol. II, 416-418).

The Plan did not definitely elect an integrated public utility system to be retained by American. American had within its system several groups of properties which the Plan contended conformed to the statutory definition of integrated systems, viz., the northwestern group of proper- ties in the Pacific northwest, including Oregon, Washington, Idaho and Montana, the Texas system in the State of Texas, the Kansas-Nebraska system in Kansas and Nebraska, the Minnesota-Superior system in Minnesota and Wisconsin, and the single company systems of Florida Power & Light Company and Central Arizona Light and Power Company (R., Vol. II, 422-429). It was proposed that American should retain and continue to operate such of these systems as the S. E. C. might permit, and distribute

the stocks of remaining subsidiaries to the stockholders of the reorganized American Company in proportion to their holdings (R., Vol. II, 420-421). Thus the end result in the case of American would be that upon reorganization it would be a single stock holding company retaining only such integrated system or systems as it might be entitled to hold under the statute.

The S. E. C. refused to consider the Plan as an alternative to dissolution, first, because it found that the Plan would not effectuate the statutory requirements promptly, or perhaps at all, because it would be necessary for the S. E. C. to explore a number of very complex steps before reaching a conclusion and the Plan might never meet the approval of the stockholders (R., Vol. II, 639-641). Second, it found the Plan was incomplete because it did not state how many shares of new capital stock were to be issued or the aggregate par value thereof, or the proportions in which they should be allocated, did not make definite provision for the retirement of outstanding debt, or definitively elect the system which it was to retain. Third, it found the Plan was ineffective in that while it simplified the corporate structure of American, it did not provide for the elimination of Bond and Share from the system, so that if Bond and Share should emerge with blocks of voting securities which would enable it to exercise a controlling influence in the companies, the system would still violate the standards of Section 11(b)(2) of the Act. Finally, the S. E. C. said that the Plan did not propose to breathe functional vitality into American, and it might be better to create new holding companies if such were advisable for any properties that were to be kept together (R., Vol. II, 641-647).

It is difficult to understand these criticisms on any theory other than that the S. E. C. had predetermined in its

order of June 7, 1940 to terminate the existence of American.

The initial objection of delay in effectuating statutory requirements exists equally if not more potently in the order of dissolution as entered by the S. E. C. The S. E. C. in its order stated in effect that American cannot presently dissolve, but the S. E. C. must first solve these same complex problems with respect to the subsidiary companies which American was said to have created.

Concededly, as a finished document, the Plan was incomplete in that it neither stated definitely the capitalization of the reorganized company, nor the distribution thereof among classes of security holders, and failed to specify the integrated system which American would retain. Any statement as to capitalization and distribution thereof could be nothing but *pro forma*. This was a matter which had to be determined by the S. E. C. upon some basis of valuation of the properties and determination of the equities of the different classes of security holders.

American could not elect an integrated system until it knew what systems the S. E. C. would approve as single integrated systems, or how many such systems the S. E. C. would permit it to retain. There had been no definitive decisions by the S. E. C. at the time of filing the Plan on these matters. It was clearly the duty of the S. E. C. under the provisions of the Act to define integrated systems so that it might be determined which systems would be retained. It has had no hesitancy in so doing in other cases.*

Furthermore, it has been the consistent practice of the S. E. C. to permit what might be termed preliminary plans

* See, for example, *In the Matter of Engineers Public Service Company*, Holding Company Act Release No. 3796, Sept. 17, 1942, and *In the Matter of The North American Company*, Holding Company Act Release No. 3405, April 15, 1942.

or proposals of various natures to be filed with detail to be supplied by amendment.* After plans have gone to hearing and been approved in principle by the S. E. C., it has indicated what amendments would be required in the matters of reclassification of stock or otherwise to secure S. E. C. approval.** The suggestion by the S. E. C. that it would have had to commence its proceedings all over every time an amendment or new plan was filed ignored its settled practice.

The objection of the S. E. C. (R., Vol. II, 644) that the Plan did not provide for severance from the Bond and Share System was purely captious. It is obvious that upon reorganization of American, Bond and Share's interest would be so small that no question of control through stock ownership could possibly be presented. This is evidenced by American's proposal to reclassify its preferred and common stock into a single class now pending before the

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* *In the Matter of Ogden Corporation* (Holding Company Act Release No. 4307, May 21, 1943, at p. 27): "The plan does not contain the details for the carrying out of its objectives; instead, it is contemplated that the steps to be taken in fulfilment of such objectives will be supplied by specific plans to be filed by the respective companies involved, or by amendments to the plan before us." See also *In the Matter of The California Oregon Power Company* (Holding Company Act Release No. 3728, Aug. 12, 1942, at p. 10), where the Commission approved the "general program" as outlined in the application and declaration; and *In the Matter of Jacksonville Gas Company* (Holding Company Act Release No. 3959, Dec. 9, 1942), where the S. E. C. reviewed the outline of the mechanics for the final consummation of a plan which had already received its general approval.

** In the following instances the S. E. C., after a hearing indicated that it would approve submitted plans provided that certain changes were made with respect to voting power, the par value of new stock to be issued or other provisions of the plan: *In the Matter of International Utilities Corporation* (Holding Company Act Release No. 4896, Feb. 15, 1944); *In the Matter of Standard Gas and Electric Company* (Holding Company Act Release No. 5070, May 31, 1944); *In the Matter of Community Power and Light Company* (Holding Company Act Release No. 3676, July 18, 1942, and No. 3794, Sept. 19, 1942); *In the Matter of The Laclede Gas Light Company* (Holding Company Act Release No. 5062, May 24, 1944).

S. E. C. in which Bond and Share's interest in the new stock would be approximately 5½% (Holding Company Act Release No. 4695, November 19, 1943). In any event, American is powerless to eject any stockholder, whether controlling or otherwise, from his holdings. This is clearly the function of the S. E. C. (R., Vol. I, 275).*

The final suggestion of the S. E. C. (R., Vol. II, 645) that new holding companies should be organized to serve any holding company purpose strikes one as highly artificial. Whatever may be said for or against the present American Company, it has within its present structure, as the S. E. C. opinion in effect conceded, the capital required to assemble the properties for the retained systems, and at least a skeleton personnel of experienced men familiar by long association with the properties, capable of ready expansion to whatever might be required successfully to operate the properties if divorced from the service organization of Bond and Share. To require the liquidation of this capital and the assembling of a new personnel would seem to be highly inexpedient and to involve unnecessary and substantial losses to security holders.

As illustrative of inconsistency in the S. E. C.'s proposed solution of the problems here presented with those adopted in other cases, reference is made to the opinion and findings of the S. E. C. in *In the Matter of The United Corporation* (Holding Company Act Release No. 4478, August 16, 1943). There, on substantially identical ultimate findings to those made by the S. E. C. here, the S. E. C.

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* This is the remedy proposed by the S. E. C. in the case of Bond and Share's other subholding companies, American Gas and Electric Company and American & Foreign Power Company (Holding Company Act Release No. 4305, May 19, 1943).

adopted the very procedure urged by these petitioners and rejected by the S. E. C.*

The reasons given by the S. E. C. for disregarding the Plan and refusing hearing thereon were arbitrary and specious.

(f) Section 11(b)(2) does not authorize the S. E. C. to direct dissolution of a corporation, an objection which the Court below erred in refusing to consider.

Before arguing the point that the language of Section 11(b)(2) does not authorize the S. E. C. to dissolve any corporation, we will deal with the holding of the Court be-

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* In the following comparison, the first reference is to the page of the S. E. C. Release relating to United Corporation, cited above, and the second is to the Record page containing the parallel finding in the cases at bar:

1. The United Corporation performs no useful function in the holding company system of which it is a part and burdens it with unnecessary expense (Release, pp. 27-28) as American and Electric perform no useful functions and entail unnecessary expense in the Bond and Share system (R., Vol. II, 634).

2. The corporate structure of the United Corporation unduly complicates the system of which it is a part (Release, p. 29; compare R., Vol. II, 624).

3. These complexities have resulted in accumulated arrearages of preferred stock dividends (Release, p. 28, compare R., Vol. II, 630-632).

4. The United Corporation causes an unfair distribution of voting power among security holders of its system (Release, pp. 30, 31; compare R., Vol. II, 622-624).

5. The United Corporation's plan is defective and affords no assurance of prompt and ready compliance with the Holding Company Act (Release, pp. 37, 45; compare R., 647).

6. Appropriate remedy for the United Corporation is dissolution (Release, p. 50; compare R., 636).

Notwithstanding this conclusion, dissolution order was withheld to give the United Corporation an opportunity to comply with the Holding Company Act (Release, p. 50), whereas a similar opportunity was denied to American despite its express contentions, recognized but denied by the S. E. C., that such opportunity should be vouchsafed it before order of dissolution should be entered (R., 647-648).

low that American was not entitled to raise this point in that Court.

(1) The Court below erred in refusing to consider the question of the construction of Section 11(b)(2).

The Court below in holding (R., Vol. IV, 875) that American had no standing to challenge the authority of the S. E. C. to dissolve a corporation under the language of Section 11(b)(2) accepted the S. E. C.'s contention that the objection was not urged before the S. E. C., and that this was required by Section 24(a). The Court was in error in assuming that the point had not been raised below.

In its motion to dismiss the proceeding filed with the S. E. C. September 9, 1940, petitioner did urge the objection by challenging any destruction of American as "beyond the powers of the Commission" and also as in violation of the Fifth Amendment, viz. (R., p. 352):

> "11. The exhibits offered in evidence by Commission counsel show affirmatively that respondents, American Power & Light Company, Electric Power & Light Corporation and National Power & Light Company were lawfully incorporated in accordance with the laws of the states of their incorporation, that the voting power pertaining to the various securities issued by said companies was established and determined in accordance with the laws of the states of incorporation and the charters and by-laws of said companies adopted pursuant to said laws, and that valid, legal contract rights were vested in the various security holders of said companies. *Any destruction or impairment of said contract rights is beyond the powers of the Commission* and would constitute deprivation of the property rights of the holders of said securities, in violation of the Fifth Amendment to the Constitution of the United States." [Italics added]

The petitioner was certainly not required to *argue* the point in detail before the S. E. C., since the S. E. C. had already uniformly held that it did have power to dissolve corporations pursuant to the first sentence of Section 11(b)(2). There were in the language of Section 24(a) of the Act "reasonable grounds for failure so to do". This was implicit in the stipulation accepted by the S. E. C. in closing the case that "all legal and constitutional rights, including [the] right to full judicial review" were reserved (R., Vol. II, 520, 521).

(2) Section 11(b)(2) cannot be construed as authorizing the S. E. C. to dissolve any corporation.

It is clear that the Commission has misconstrued the clause of Section 11(b)(2) of the Act which, for the purpose of this proceeding, is controlling. The statute authorizes the Commission to require system companies to "take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system" does not unduly complicate structure or unfairly distribute voting power. It is *corporate structure or continued existence in the system*, and not corporate existence which may be dealt with by the S. E. C.*

But beyond this, which seems clear, purely as a matter of simple grammatical construction, Section 11(b)(2) has a Congressional history which indicates under the decisions of this Court that Congress did not intend to confer power on the S. E. C. to take the action it has taken here, that is,

* The question of the authority of the S. E. C. to dissolve a corporation pursuant to Section 11(b)(2) was not passed upon by this Court in the recent case before this Court involving only rights of holders of preferred and common stocks in a reorganization under Section 11(b)(2), *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624 (1945).

to order dissolution of a corporation to remedy defects under the first sentence of Section 11(b)(2). There is not found in the first sentence of Section 11(b)(2) any express authority to dissolve any corporation nor is there any such authority linked to Section 11(b)(2) anywhere else in the Act. It would, therefore, be concluded that authority to dissolve a corporation was not intended to be given to the S. E. C. and was not given. This is confirmed by the Congressional history of the Act.

A purported grant of authority to the S. E. C. to dissolve corporations to accomplish the purposes set forth in Section 11 of the Act was contained in the original bills introduced in the Senate and the House, but was *stricken* from the bill as finally passed by Congress.* This action of Congress disposes of any claim that Section 11(b)(2) authorizes the S. E. C. to decree dissolution of any corporation.

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* The original bills introduced in the Senate and House (S. 1725 and H. R. 5423 (74th Congress, 1st Session), both dated February 6, 1935) were based on studies made by the predecessor administrative body to the S. E. C., the Federal Trade Commission. They provided generally for dissolution of all public utility holding companies. The Senate bill and the House bill were substantially identical. The only difference was that the sections were numbered differently, and the present Section 11 was numbered Section 11 in the Senate bill, but numbered Section 10 in the House bill. The disintegration and reorganization provision of these bills (Section 11 in the Senate bill and Section 10 in the House bill) contained in subsection (a), as in the present subsection (a) of Section 11, provisions for a study of each holding company system by the S. E. C. In subsection (b) there were four subdivisions. Both of these bills contained provisions for divestment of assets (subdivisions (1) and (2)), and permitted the S. E. C. to require dissolution or reorganization of certain corporations in a holding company structure after January 1, 1938 (subdivision (3)) and to compel dissolution of every holding company after January 1, 1940 except those which might obtain a "certificate of necessity" from the Federal Power Commission (subdivision (4)).

The bill which emerged in the Senate from its Committee on May 7, 1935 (S. 2796) was substantially the same as that first introduced in the Senate, except that the original subdivisions (1) and (2) of Section 11(b), both relating to the disposal of assets,

The S. E. C. in its Findings and Opinion points to Section 1(c) of the Act as though that indicated an intention to confer power to dissolve corporations. This clause states that one purpose of Congress was "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title." But this statement cannot be construed to sustain the power to *dissolve* corporations, particularly in the face of Congressional action removing authority to dissolve from Section 11(b)(2). There is no reference in the clause just quoted to dissolution of any corporation but simply to "elimination" of holding companies, "except as otherwise expressly provided." The meaning of "to

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had become subdivision (1) of subsection (b) of Section 11. Subdivision (2) of the Senate Committee bill was the provision permitting the S. E. C. to require dissolution of a corporation for purposes of simplification (to which the Senate Committee had added the phrase about distribution of voting power), and subdivision (3) was the provision authorizing the S. E. C. to compel dissolution of every holding company after January 1, 1940. The Senate passed the Senate Committee version of the bill on June 11, 1935.

The House Committee to which the bill introduced into the House was sent objected to the provisions authorizing the S. E. C. to compel the dissolution of corporations in a holding company structure, and the bill which was reported to the House by the Committee on June 24, 1935 contained in its disintegration and reorganization section (now finally numbered "11") only subsection (a) providing for study of holding company systems by the S. E. C., and subsection (b)(1) providing for divestment of assets to accomplish economic integration.

What the House then did was to act on, and reject, the Senate bill. It voted, on July 2, 1935, to amend the Senate bill by striking out its entire contents and to substitute therefor the provisions recommended by the House Committee. The bill passed by the Senate and the bill passed by the House went to a conference committee and there emerged a bill in both branches of Congress which became the Public Utility Holding Company Act, signed by the President August 26, 1935. This bill removed, from subsection (b) of Section 11, subdivision (3) of the original bill passed by the Senate the authorization to the S. E. C. to compel dissolution of holding companies in a public utility company holding system after January 1, 1940, and removed, from subdivision (2) of Section 11(b), any grant of authority to the S. E. C. to dissolve any corporation.

eliminate" is not "to destroy" but is "to thrust out," "to remove and get rid of by disengaging from environment or associations" (Webster's International Dictionary, Second Edition). A holding company can be eliminated by making it divest itself of stock in its subsidiary holding company or operating company or making it give up its vote on such stock, as, for example, Bond and Share could be required to give up its stock in American or its vote on such stock. There are many ways in which holding companies can be eliminated from a system without dissolution and destruction. Futhermore, as already pointed out in Point II, the S. E. C. has conceded that Section 1 of the Act is not in itself operative.

In any event, the action of Congress in striking out express authority to dissolve corporations from Section 11(b)(2) before passage of the Act, is controlling. Even if there were ambiguity in Section 1(c) such provision could not be deemed to authorize dissolution in the face of such excision. The decisions of this Court are clear that if a provision in a bill is omitted at the insistence of one of the houses of Congress, and the bill is ultimately passed without the provision, other provisions of the bill cannot be deemed to include the substance of the omitted provision.

Pennsylvania Railroad Co. v. *International Coal Mining Co.*, 230 U. S. 184 (1913);
Carey v. *Donohue*, 240 U. S. 430 (1916);
Helvering v. *Wood*, 309 U. S. 344, 348 (1940).

We have not attempted to burden the Court with a discussion of any statements of individual members of either House or of Committees about the bills because, as this Court said in *Pennsylvania Railroad Co.* v. *International Coal Mining Co., supra* (230 U. S., pp. 198-199), such

statements are of no force and effect as against the clear intendment of Congressional action in eliminating a provision from a bill in the passage of an act.

There is certainly no indication from the history of the Act that the striking out of the express provisions for "dissolution" and the substitution of the present language of the Act was meaningless. The provision for dissolution was the focal point of objection in the House to the bill, and the House consented to the passage of the bill only after the elimination of that provision.

Looking at the companion provision, Section 11(b)(1), it would appear that it was not the intention of Congress to authorize the S. E. C. to dissolve any holding company. Section 11(b)(1) provides for integration, indicating that a holding company is to be authorized to continue to exist and to retain at least one integrated system. It is certainly inconsistent with this other subdivision of Section 11 to read into Section 11(b)(2) an intention to dissolve any holding company.

It would, therefore, seem plain that Congress did not intend to authorize the S. E. C. to enter a dissolution order such as was entered here to remedy alleged defects under the first sentence of Section 11(b)(2).

(g) Dissolution of American is an unreasonable, arbitrary and oppressive means of remedying alleged defects in the Bond and Share System.

In view of the absence of any guide in the Section and of its Congressional history and also in view of the failure of the S. E. C. itself to develop or announce any standard for determining the presence of "unfair or inequitable distribution of voting power" or "undue or unnecessary complication of structure" in the Bond and Share System, it would be assumed that the S. E. C. would have proceeded

with the utmost care and regard for the property rights of the public security holders of American. As this Court said in *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 636-637, 638 (1945):

> "Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve values to investors, not to destroy them."

and, again,

> "We must assume that Congress intended to exercise its power with the least possible harm to citizens."

In such a situation the S. E. C. should have selected a course of action the most reasonably and logically connected with some feature of the structure expressly found by it to be within the controlling phrases of the Section and the least oppressive and harmful to petitioner and its security holders. In these circumstances the means selected should certainly have a real and substantial relation to the object sought to be attained.*

The sole issue in the proceeding before the S. E. C. in accordance with the May 9, 1940 order of the S. E. C. was whether there was any "unfair or inequitable distribution of voting power" or "undue or unnecessary complication

* There is every indication that the S. E. C. had prejudged the action it was going to take. Even before American filed an answer, and, before the hearings commenced, the S. E. C. entered an order June 7, 1940, limiting the proceeding to the issue "whether it is necessary to discontinue the existence of American * * * in order to insure that the structure of the holding company system of Electric Bond and Share Company shall not be unduly or unnecessarily complicated and that voting power shall not be unfairly or inequitably distributed among security holders of that system * * *" (R., Vol. I, 65-6), thus eliminating in advance of hearing the various alternative steps which might have been ordered.

of structure'' in the *Bond and Share System.* American is only in the Bond and Share System because Bond and Share owns 4½% in book value of its stock.* If Bond and Share did not hold this comparatively minor percentage of the common and preferred stocks of American, American would not be in the Bond and Share System and could not be claimed to cause any unfair or inequitable distribution of voting power or undue or unnecessary complication of structure therein.

It is clear that the dissolution of American and the destruction of its property and that of its public security holders is an unreasonable, arbitrary and oppressive means of remedying some unspecified defect in the Bond and Share System, when there was a more simple and directly-related means with no such attendant injury.

Such a means is particularly oppressive in view of the stress laid by the S. E. C. in its Findings and Opinion on the alleged abuses by Bond and Share prior to the enactment of the Act, of which the public security holders of American were the victims. There is no reasonable explanation whatsoever why the S. E. C. did not take the simple and virtually harmless course of ordering Bond and Share not to vote its comparatively small stock interest in American (4½%), or to trustee such stock with individuals selected by the S. E. C., or to dispose of such stock. In the language of this Court in *Regal Knitwear Co. v. National Labor Relations Board,* 324 U. S. 9, 13 (1945), (Mr. Justice Jackson), ''the infirmity is inadequacy of findings to show appropriateness of the choice made.''

The complete lack of basis for the S. E. C. claim that American must be dissolved to simplify the Bond and Share

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*It should be pointed out that no such situation obtains between American and its subsidiaries; American owns substantially 100% of the common stock of each of its subsidiaries.

System was demonstrated when the S. E. C., in the year after the order for dissolution of American was entered, commenced a proceeding, now pending, to break up the balance of the Bond and Share System (Holding Company Act Release No. 4305, May 19, 1943). In the proceeding mentioned, the issue was stated by the S. E. C. to be whether Bond and Share should be compelled to divest itself of its holdings in its two remaining holding company subsidiaries, American Gas and Electric Company and American & Foreign Power Company, Inc. It cannot possibly be reasonable to dissolve American in order to simplify a system which in any event is not to be preserved.

Moreover Bond and Share has recently itself commenced a proceeding before the S. E. C. to divest itself of its holdings in American (Holding Company Act Release No. 5970, August 6, 1945). How can the S. E. C. then claim that American must be dissolved to simplify a system which is proceeding forthwith, and irrespective of the dissolution order, to eliminate American therefrom?

The arbitrary and unreasonable action of the S. E. C. in ordering dissolution of American was clearly a violation of the due process clause of the Fifth Amendment.

Conclusion.

The statute does not represent an exercise of a Federal power, it violates the constitutional limitations on the taking of property without compensation, and it contains an oppressive grant of legislative power in violation of the due process clause.

The order and the proceeding on which it is based were also unauthorized, oppressive and violative of the due process clause.

The orders of the S. E. C. appealed from should be set aside in all respects.

Respectfully submitted,

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